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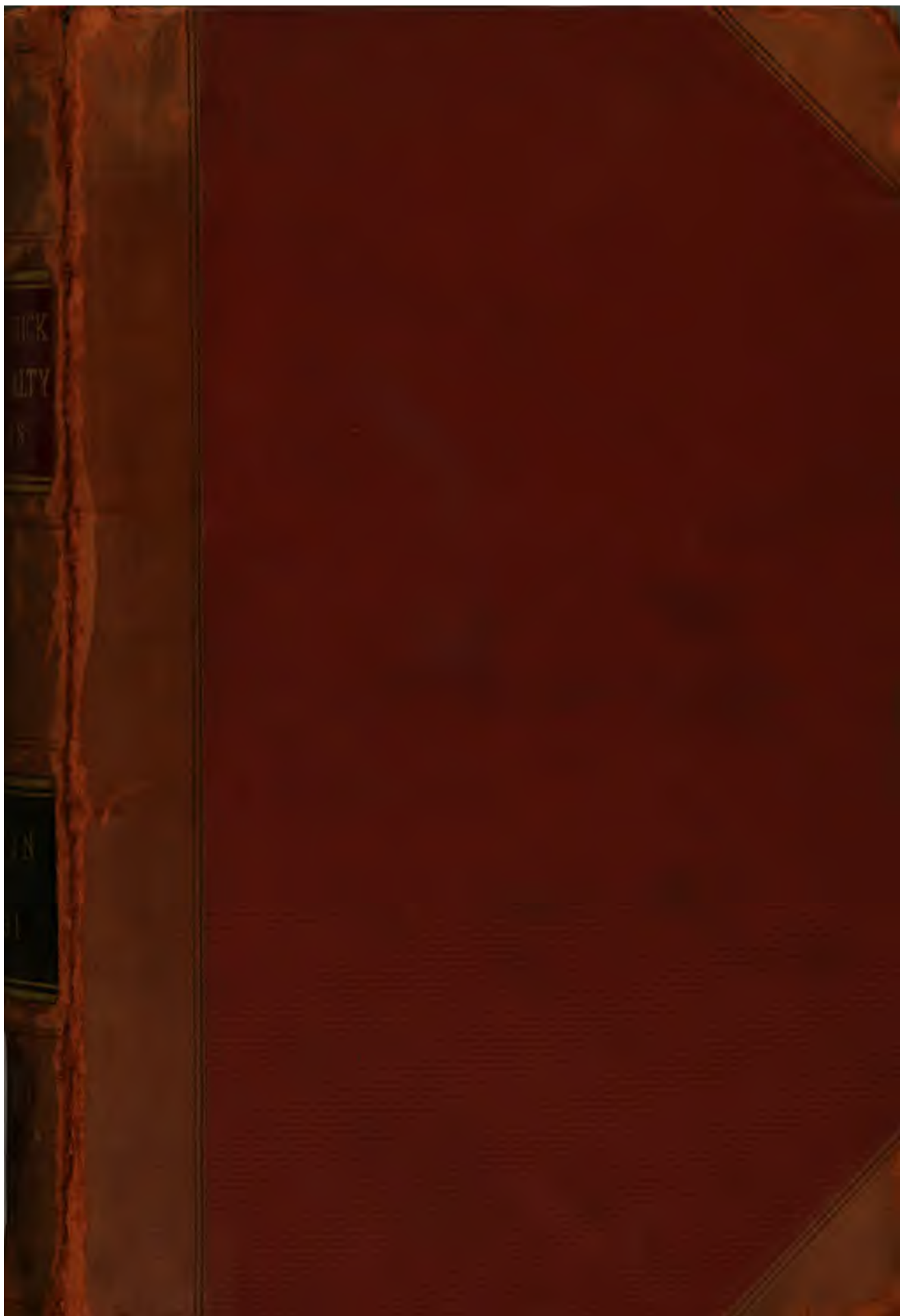
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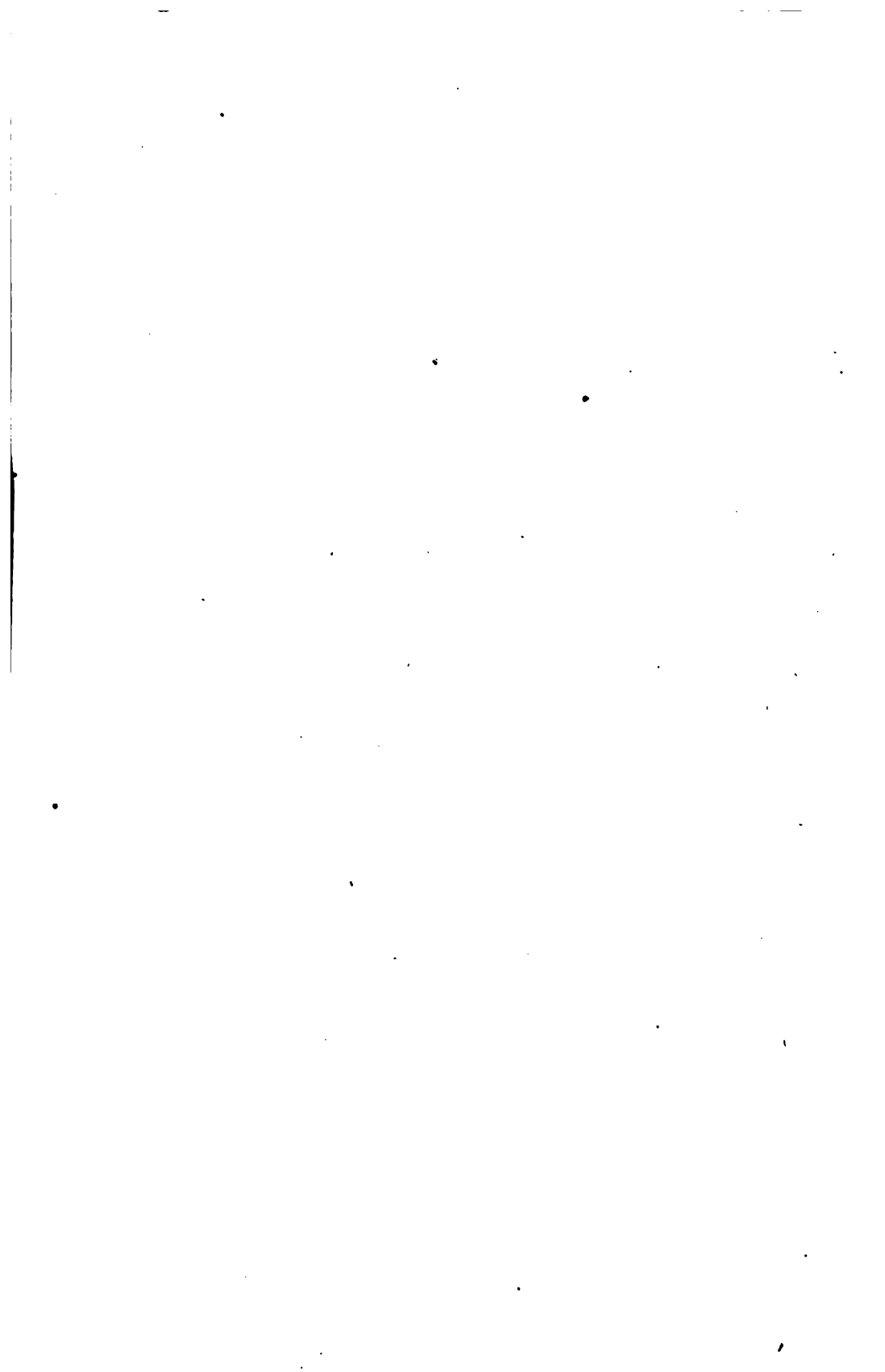
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REPORTS OF CASES

DECIDED IN THE

VICE-ADMIRALTY COURT

OF

NEW BRUNSWICK

FROM 1879 TO 1891.

WITH

AN INTRODUCTION ON ADMIRALTY JURISDICTION; TABLES OF THE CASES REPORTED
AND CITED; THE IMPERIAL AND CANADIAN STATUTES RELATING TO ADMIRALTY
JURISDICTION AND PRACTICE; THE NEW RULES OF 1893; AND A FULL

DIGEST

OF ALL CANADIAN VICE-ADMIRALTY CASES.

BY

ALFRED A. STOCKTON, D. C. L., LL. D., Q. C.

*Of the New Brunswick Bar ; for some time Registrar of the Court ; Editor of Berton's Reports
of the Supreme Court of New Brunswick ; and Lecturer on the Law of Admiralty
and Shipping in the Law School at St. John, N. B., of the
University of King's College, Windsor, N. S.*

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TO THE
HON. WILLIAM H. TUCK, D.C.L.
ONE OF THE JUDGES OF THE
SUPREME COURT OF NEW BRUNSWICK
AND
JUDGE IN ADMIRALTY
OF THE
EXCHEQUER COURT OF CANADA,
FOR THE ADMIRALTY DISTRICT
OF THE PROVINCE OF NEW BRUNSWICK,
THIS VOLUME
IS
BY HIS PERMISSION
RESPECTFULLY DEDICATED.

PREFACE.

This volume contains the most important judgments delivered by the late Mr. Justice Watters, as Judge of the Vice-Admiralty Court of New Brunswick, between the years 1879 and 1891. During his tenure of office as Judge of the Court, he discharged the duties of his high position with eminent ability, and to the entire satisfaction of the public and the Bar. My duties, as Registrar of the Court, brought me into frequent and close contact with him, and I soon learned to esteem him as a man and respect him as a Judge. It was understood between us that I would at some time publish his judgments. After his death they were found carefully arranged by themselves, and were, by his representatives, handed to me for publication. I now give them to the public fully persuaded they will prove of advantage to the profession. Three cases by other Judges have been included in the volume. In the case of *The Teddington*, p. 54, will be found a valuable judgment of Mr. Justice Palmer, refusing a writ of prohibition, and ably discussing the early jurisdiction of the High Court of Admiralty. The case of *The White Fawn*, p. 200, was decided by the late Hon. Robert L. Hazen, then Judge of the Court. It gives a construction to the clauses of the Imperial Statute 59 Geo. III. c. 38, and the Canadian Statutes 31 Vict. c. 61, and 33 Vict. c. 15, relating to the protection of our Fisheries. This decision was quoted with approval by the Counsel for the United States before the Halifax Fishery Commission. It is at variance with the decision of Sir William Young, C. J., in the case of *The J. H. Nickerson*, in the Vice-Admiralty Court of Nova Scotia. The case of *The Chesapeake* is not strictly an Admiralty case; but the circumstances surrounding it, and the very important questions discussed by Mr. Justice Ritchie in discharging the prisoners from arrest on the charge of piracy, justify its insertion in this volume.

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The reader will notice that all the reported cases deal with important and leading principles of Admiralty law. At the end of each case will be found full and ample notes containing citations of English, Canadian and American authorities, bringing the law down to the present time. The Imperial and Canadian Statutes relating to Admiralty jurisdiction and practice have been included. The Colonial Courts of Admiralty Act, 1890, Imp. (53-54 Vict. c. 27); the Admiralty Act, 1891, Can. (54-55 Vict. c. 29), and the Rules of 1893, framed under the authority of the two last mentioned Acts, have been given *in extenso*. At the close of the volume has also been inserted a full and complete Digest of all reported Canadian Admiralty cases. These features will, it is hoped, make the work of general utility in actual practice. In the Introduction an attempt has been made, in concise terms, to give the reader an outline of that struggle for jurisdiction, which was waged in England for more than two centuries between the High Court of Admiralty and the Courts of Common Law. The criticism may be made that such a discussion has at present no practical value. I cannot share that view, and trust it may prove useful to those desirous of studying that period of Admiralty law.

It is almost needless to remind the reader that the jurisdiction now exercised by the Admiralty Court in Canada is as wide and comprehensive as the most enthusiastic advocate of its ancient jurisdiction ever claimed. This has been accomplished from time to time during the last half century by enlightened legislation designed to meet the requirements of modern commerce. All questions touching our merchant marine practically come within the scope of its present jurisdiction.

My thanks are extended to Mrs. Stuart, of Quebec, widow of the late Judge Stuart, for ready permission given to make what use I deemed proper of her late husband's Reports, in preparing the Digest; also to William Cook, Esq., Q. C., of the same place, for similar permission as to his valuable volume of Reports.

PREFACE.

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I also am indebted to Heber S. Keith, Esq., B. A., Barrister-at-Law, for the table of cases cited, and for assistance rendered in the preparation of the Digest.

The volume—prepared amid many other pressing duties—is now given to the public with the earnest hope that it may prove useful to the profession.

A. A. STOCKTON.

94 PRINCE WILLIAM STREET,
ST. JOHN, N. B.,
November 2, 1894.

**DURING THE PERIOD COMPRISED
IN THIS VOLUME.**

JUDGE.

THE HON. CHARLES WATERS.

DEPUTY JUDGE.

THE HON. B. LESTER PETERS.

REGISTRAR.

ALFRED A. STOCKTON, LL. D., Q. C.

MARSHAL.

THOMAS C. HUMBERT.

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INTRODUCTION.

The beginning of the jurisdiction of the High Court of Admiralty in England dates from an early period in English history. It is now impossible to fix the precise time when that jurisdiction began, and when it was first exercised. The opinions of those deeply read in the history and antiquity of our laws are far from agreement upon this point. A short dissertation, therefore, upon the early history of Admiralty jurisdiction may, by some readers, be considered at best but useless speculation—incapable of accomplishing any beneficial purpose—and of no practical utility to the busy practitioner. The statement, however, is ventured that it is by no means unscientific to study jurisprudence historically as well as practically. It is both wise and proper to trace the rise, growth and latest development of every branch of law through its period of early usage, legislation and judicial decision. Such were the views of that great French jurist, Emerigon, who, when discussing one branch of early maritime law, wrote that “Researches into the antiquities of this legislation will not appear useless to those persons who may have remarked that these ancient doctrines, of which many are no longer in use, are nevertheless the foundations of others which are in vigor in the present day, and which it is consequently difficult to comprehend thoroughly without having reference to the ancient doctrines.” The learned reader well knows that those pursuing this method of investigation soon discover that principles of law and rules of decision, supposed to be of modern origin, were familiar, and fully recognized in the legal codes of ancient States. These remarks are especially applicable to the laws of maritime nations. The ancient maritime codes or sea laws have come down to the present day, and may be found among the marine laws of modern times. These codes were compiled and adopted from time to time by ancient States to foster and extend their foreign sea-borne commerce. While there was not in those early times that facility of transit and commercial interdependence so prominent at the present day, yet there was in many particulars a similarity between the sea laws of the South and North of Europe. This has been well stated by Sir Travers Twiss (1) when he says: “The usages of maritime commerce, although

(1) Black Book Ad. vol. 3, lxxx.

they have been reduced into writing at very different epochs in different countries, exhibit a striking identity of character, which contrasts singularly with the great diversity, which is to be observed in the civil institutions of these countries. Two principal causes may have operated to bring about this result. In the first place the circumstances which gave rise to these usages were nearly identical in every country, and it was the interest of each country to be just in such matters, in order to secure reciprocity for its merchants and mariners in other countries. In the second place, at the time when the enterprises of the Italian Republics in the South and of the Hanse Confederation in the North were indirectly co-operating to bring about a great commercial revolution in Europe, merchants and mariners were left at liberty to set laws to themselves, and the usages of one locality were readily adopted by another, as soon as the superior convenience and equity of them were recognized. This result was greatly facilitated by a wise provision of the Visigothic code, which was received in Spain and in the South of France, under which merchants from beyond the sea were allowed to have their disputes settled by their own judges according to their own laws. On the other hand, the maritime usages of Southern Europe commended themselves at once to the acceptance of Northern Europe by their intrinsic convenience and equity, the more readily as the adoption of them was calculated to induce the merchants and mariners of the South to frequent the ports of the North." The contention has been put forth, but unsuccessfully, that there never was a system of maritime law generally observed by the peoples of ancient maritime States. The little island of Rhodes, southwest of Asia Minor, and southeast from Athens, must ever be an object of interest to the student of ancient sea laws. Her people became famous for the extent and richness of her commerce, and the boldness of her navigators; but they acquired higher fame and became more illustrious by reason of being the founders of a system of marine jurisprudence to which even the Romans paid a profound deference and respect. The Rhodian laws among the ancient sea codes were foremost in antiquity and authority. When these laws were compiled it is difficult now to state, but writers assume it was when the Rhodians first obtained the sovereignty of the sea, which was more than nine hundred years before the Christian era. Cicero, in his oration on the Manilian law, refers to this compilation, not only as well known in his time, but as having attracted the admiration of the world. The best authorities are agreed that the compilation has been wholly lost, but many of the principles embodied therein have

come down to us through the medium of the Roman law. According to Selden, this code was incorporated into the Roman law in the time of Tiberius Claudius, and Azuni declares it to be "the fountain of maritime jurisprudence." It is doubtful if these laws were followed in the Roman Courts during the time of the Republic, but there can be no doubt as to their authority under the Empire. Augustus declared them to be a part of the law of the Empire, and in this he was followed by Antoninus Pius. The answer of the last named Emperor to an application for his decision upon a case referred to him was as follows: "The earth is subject to my dominion; the sea to that of the law. Let the case be determined by the Rhodian law on naval affairs, the provisions of which I direct to be observed in future in all cases where they are not repugnant to the laws of Rome. The same decision was formerly made by the divine Augustus." Chancellor Kent is authority for the statement that "the Romans never digested any general code of maritime regulations, notwithstanding they were pre-eminently distinguished for the cultivation, method and system which they gave to their municipal laws. They seem to have been contented to adopt as their own the regulations of the Republic of Rhodes. The genius of the Roman government was military, not commercial." The law of jettison can be directly traced to the Rhodian code. *Lege Rhodia cavetur, ut, si levandæ navis gratia, jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.* There can be no doubt but that the nations bordering on the Mediterranean at a very early period had adopted these laws, modified, no doubt, in many cases, to suit the changing growth and development of commerce and civilization. From these latter sprang the law merchant and customs of the sea; and hence arose, by the middle of the thirteenth century, written codes of maritime laws, such as the *Consolato del Mare*, embodying the customs prevalent at Barcelona; the laws of Oleron, being the usages of Bordeaux and the Isle of Oleron; the laws of Wisbuy, followed by the countries of Northern Europe, especially the Hanse towns. It is not necessary in this connection to notice the many discussions as to the age and authority of these different codes, and many others which readily occur to the mind of the reader. There has been much discussion as to whether the laws of Oleron or Wisbuy was the more ancient code, but the best opinion at the present time concedes that distinction to the Rolls of Oleron.

Park says these laws "are in substance but an abstract of the old Rhodian laws, with some additions and alterations accommodated

to the practice of that age and the customs of the western nations," and that they were proposed as a "common standard and measure for the more equal distribution of justice amongst the people of different governments. These excellent regulations were so much esteemed that they have been the model on which all modern sea laws have been founded."

They were published about A. D. 1150 by Eleanor, the mother of Richard I. of England, and with additions possibly of that monarch adopted into that country. Hallam ridicules the statement, at one time industriously circulated, that these laws were collected and declared by Richard I. at Oleron on his return from the Holy Land. The fact is now well established that Richard did not visit the island of Oleron on his way home, and a late writer (1) suggests that all that is meant by the roll entitled "*Fasciculus de superioritate maris*," is that King Richard adopted and sanctioned these laws as rules proper to be observed in England. It is important in this connection to know that, by common consent, these laws are admitted to be the foundation of all the European maritime codes.

They were adopted in England at a very early period, the precise time it is now impossible to state, and were incorporated into our ancient sea laws as found in the Black Books of the Admiralty. This work was compiled for the use of the Lord High Admiral and his deputy, who presided as judge in the Court of Admiralty. When Sir Travers Twiss issued volume one of his edition of the Black Book in 1871, the original work was missing, and could not be found. An inquiry at the registry so long back as 1808 was met by the answer that the officials "had never seen such a book and knew nothing of it." By some, Selden's MS. in the Bodleian library at Oxford, was supposed to be the original Black Book, but controversies on this point were set at rest by the accidental finding of the original book at the bottom of a chest in the cellar of the Admiralty registry. This was prior to the publication of volume three of the work by Sir Travers Twiss in 1873. The result of an examination of the original by Twiss satisfied him that no part of the writing of the Black Book was of a period earlier than the reign of Henry VI. (A. D. 1422). But it also disclosed satisfactory proof that it contains ordinances purporting to be made in the reigns of Henry I., Richard I., King John, and Edward I., respectively. In the two MSS. now in the archives of the Guildhall of the City of London, and in other

(1) Twiss.

records which are extant, there are references to the laws of Oleron directly connecting that compilation with the laws found in the Black Book.

These laws were recognized by King John at Hastings, and by the time of Edward I. they had been adopted by the Maritime Courts for the determination of sea causes (1). At the same time there is no reason to suppose there were any regularly organized tribunals for the settlement of these causes before the reign of that King. There is, however, a fair presumption that to this ruler is due the credit of organizing the first Admiralty Court which deserved the name.

To ascertain what was the extent of the jurisdiction exercised by these Courts, recourse must be had to the language of the old commissions issued to the Admiral, and to his deputies, who were the judges. Among other powers and authorities he had the right in civil causes "to hold consueance of pleas, debts, bills of exchange, policies of insurance, accounts, charter parties, contractions, bills of lading, and all other contracts which anyways concern moneys due for freight of ships hired and let to hire, moneys lent to be paid beyond the seas at the hazard of the lender, and also of any cause, business, or injury whatsoever, had or done in, or upon, or through the seas, or public rivers, or fresh waters, streams, and havens and places subject to overflowing, whatsoever, within the flowing and ebbing of the sea, upon the shores or banks whatsoever adjoining to them or either of them, from any the said first bridges whatsoever, towards the sea, throughout our kingdom of England and Ireland, or our dominions aforesaid, or elsewhere beyond the seas, or in any parts beyond the seas whatsoever," etc.

The delegation of authority granted in the Judge's commission refers solely to the *instance* side of the Court. The *prize* side of the Court is entirely separate and distinct. The exercise of jurisdiction on the prize side of the Admiralty is invoked only in time of war; and then a special commission from the Crown is issued, ordinarily to the Judge of the instance side of the Court, but it may be issued to another. Lord Mansfield, in *Lindo v. Rodney* (2), says: "The Prize Court is peculiar to itself; it is no more liken to the Admiralty (viz., the Instance Court) than to any Court in Westminster Hall. The Instance Court is governed by the Civil law, the laws of Oleron, and the customs of the Admiralty, modified by statute law. The Prize Court is to hear and determine according

(1) Edwards Ad. 16.

(2) 2 Doug. 613 n.

to the course of the Admiralty and the law of nations. The end of a Prize Court is to suspend the property till condemnation ; to punish every sort of misbehavior in the captors ; to restore instantly *velis lavatis*, if, upon the most summary examination, there does not appear a sufficient ground ; to condemn finally, if the goods really are prize, against everybody, giving everybody a fair opportunity of being heard." All questions of prize belong exclusively to the Admiralty jurisdiction.

An American writer (1), referring to this subject, says : " The distinction between the instance and prize side of the Admiralty cannot be readily ascertained, as in the English Admiralty the Judges go into commission in prize on the breaking out of hostilities, while the jurisdiction of the American Admiralty in prize cases is inherent under the constitution of the United States. A distinction must be drawn between things guilty and things hostile. The first are triable under the municipal law in the instance side of the Court, including forfeitures for piracy ; while hostile things must be proceeded against for offences under the law of nations, on the side of the Court sitting as a Court of prize." The jurisdiction in prize cases is inherent in the United States Courts by reason of the interpretation given to section 9 of the Judiciary Act of 1789 (2).

Mr. Justice Story, in his celebrated judgment, *De Lovio v. Boit* (3), maintaining the ancient jurisdiction of the Admiralty, is authority for the statement that the Admiralty of England and the Maritime Courts of all the other powers of Europe were formed upon one and the same common model, and that their jurisdiction included the same subjects as the Consular Courts of the Mediterranean. And in the *Consolato del Mare* that jurisdiction is said to embrace " all controversies respecting freight, of damages to goods shipped, of the wages of mariners, of the partition of ships by public sale, of jettison, of commission or bailments to masters and mariners, of debts contracted by the master with merchants, or by merchants with the master, of goods found on the high seas or on the shore, of the armament or equipment of ships, galleys, or other

(1) Henry Ad. 82.

(2) The reader who wishes to pursue this investigation further, may consult the following authorities : 2 Browne, Civ. and Ad. Law, pp. 71-208 ; 1 Kent, Com. (11 ed.), 380 ; 1 Pritchard's Ad. Dig. (3 ed.) ; Henry, Ad. 82 ; Benedict, Ad. (3 ed.), 287 ; Edwards, Ad. 214. *The Little Joe*, Stewart, 394.

(3) 2 Gall. 398.

vessels, and generally of all other contracts declared in the customs of the sea." This range of jurisdiction, formerly exercised by the Admiralty Court until restrained by writs of prohibition issued by the Common Law Courts, has been restored to it by modern legislation.

The broad and comprehensive powers conferred by the ancient commissions upon the Court increased the desire of the Admiral and his deputies to grasp at still greater jurisdiction. In those early times fees and emoluments were attached to the jurisdictions of the Courts, and the Courts were therefore naturally "ingenious and grasping in their efforts to extend their power." The Admiralty jurisdiction in this manner was strained beyond legal bounds, and loud complaints arose in consequence. Complaints were also made that other Courts were encroaching on the jurisdiction of the Admiralty. These latter complaints at length became so urgent that they were referred to Edward I. and his council, and, after consideration, the following ordinances were proclaimed by the King at Hastings, in the second year of his reign, A. D. 1274:

"Item : It is agreed at Hastings by the King Edward the First and his lords, that as many lords had divers franchises to hold pleas in ports, their seneschals and bailiffs shall hold no plea if it touch merchant or mariner, as well by deeds as by obligations or other deeds, whether the same amount to twenty or forty shillings, and if any one shall be indicted for doing the contrary, and shall be convicted, he shall have the same judgment as below provided."

"Item : Every contract made between merchant and merchant, or merchant and mariner, beyond sea, or within the flood mark, shall be tried before the Admiral, and not elsewhere, by the ordinance of the said King Edward and his lords" (1).

This last ordinance, Twiss suggests, would seem to be the true starting point of the Admiral's jurisdiction in civil suits. As to the correctness of this suggestion it is not necessary, in this connection, to inquire. From the commissions and the ordinances of Edward I. above referred to, it will be admitted that in the early history of England a full, ample and far-reaching jurisdiction was accorded to the Admiralty, as complete as the most zealous defender of its ancient jurisdiction could claim or desire. It was also

(1) The entry in the Black Book of the Admiralty is as follows: *Item chascun contract fait entre marchant et marchant, ou marchant ou mariner outre la mer ou dedens le flode mark sera trie devant l'Admiral et nenient ailleurs par l'ordonnance du dit Roy E. et ses seigneurs.* (Twiss, vol. 1, p. 68. See also Benedict Ad., 3rd ed., 32; Edwards 8).

further provided that all questions and disputes "of auntient right belonging to the maritime law" should be tried in the Admiralty and not in the Common Law Courts (1).

This jurisdiction was not confined to maritime contracts, nor to contracts beyond the sea, but was extended to every contract "within the flood mark." What is to be understood by the "flood mark" may be learned from Lord Coke's judgment in Sir Henry Constable's case. He says: "It has been resolved by the whole Court that the soil upon which the sea doth ebb and flow, to wit, between the high water mark and the low water mark, may be parcel of a manor of a subject; and when the sea doth flow unto the full height, the Admiral shall have jurisdiction of any thing whatsoever done upon the water between the high water mark and the low water mark; but of everything done upon the ground when the water is returned, the common law shall have jurisdiction; so that between the high water mark and the low water mark the common law and the Admiralty shall have severally power, interchangeable as aforesaid."

And practically the same doctrine was laid down by Sir Robert Phillimore, in *Reg. v. Keyn* (2). He says: "The county extends to low water mark, where the 'high seas' begin; between high and low water mark, the Courts of Oyer and Terminer had jurisdiction when the tide was out; the Court of the Admiral when the tide was in. There appears to be no sufficient authority for saying that the high sea was ever considered to be within the realm, and,

(1) (The following is the statement in the Black Book: "Item, lett inquiry be made concerning all those whoe doe sue any merchant, marriner, or other person whatsoever at common law of the land for any thing of auntient right belonging to the maritime law, and if any one is thereof indicted and convicted by twelve men hee shalbe fined to the King for his unlawfull and vexatious suite, and besides shall withdraw his suite from the common law and shall bring it in the Admiralty Court, if hee will prosecute any further." Twiss, vol. 1, 83). The same statement of the law is entered in the Black Book (3) as Article 38 *de officio Admiralitatis*.

"Item inquiratur de hiis senescallis et ballivis quorumcumque dominorum per costeras maris dominia habencium, qui tenent vel tenere usurpent aliquod placitum mercatorum vel marinariorum concernens excedens summam quadraginta solidorum sterlingorum. Pena, qui inde indictati fuerint et super hoc convicti per duodecim, eandem penam ut supra et iudicium subibunt. Et hæc est ordinacio Edwardi primi apud Hastynges regni sui anno secundo. Et nota, quod quilibet contractus initus et factus inter calcatorem et mercatorem, marinarium, aut alios ultra mare, sive infra fluxum maris vel refluxum, vulgariter dictum fode marke, erit triatus et determinatus coram admirallo et non alibi per ordinacionem predictam."

(2) 2 Ex. D., p. 67.

(3) *ibid*, 236.

notwithstanding what is said by Hale in his treatises, *de Jure Maris* and *Pleas of the Crown*, there is a total absence of precedents since the reign of Edward III., if indeed any existed then, to support the doctrine that the realm of England extends beyond the limits of counties."

The Admiral, therefore, according to Coke's decision, would have jurisdiction over a maritime cause arising between high and low water mark when the tide was flood, and yet this would be within the body of a county. This same jurisdiction obtained and continued in the time of Edward III. This ample and extended jurisdiction, however, did not satisfy the judicial ambition of the Court. It attempted to encroach upon the jurisdiction of the common law Courts, as other Courts had attempted to encroach upon its jurisdiction, and to restrain which the ordinances of second Edward I. were passed. The Admiral and his deputies took upon themselves to decide cases which arose wholly on the land, such as trespasses, house-breaking, the regulation of the prices of provisions, the rate of wages, and such other matters as clearly did not come within the scope of its authority. This brought the subject before Parliament, and caused the passage of the Statutes 13 Richard II., c. 5, and 15 Richard II., c. 3, generally known as the restraining statutes.

The statute 13 Richard II., c. 5, was passed A. D. 1389, and is as follows :

"*Item* : Forasmuch as a great and common clamor and complaint hath been oftentimes made before this time, and yet is, for that the Admirals and their deputies hold their sessions within divers places of this realm, as well within franchise as without, accroaching to them greater authority than belongeth to their office, in prejudice of our Lord the King, and the common law of the realm, and in diminishing of divers franchises, and in destruction and impoverishing of the common people, it is accorded and assented that the Admirals and their deputies shall not meddle from henceforth of anything done within the realm, *but only* of a thing done upon the sea, as it hath been used in the time of the noble prince, King Edward, grandfather of our Lord the King, that now is."

Much of the controversy between the Admiralty Court and the Courts of Common Law arose in consequence of the double meaning capable of being placed upon the words "*but only*," italicised in the above statute. The intention of the enactment evidently was not to cut down any jurisdiction exercised by the Admiralty in the time of Edward I., but to restrain it from meddling with cases arising upon the land.

Mr. Benedict (1), in his able work, has clearly and forcibly pointed this out. He says that "but only" is simply another expression for *unless* or *except*, and by substituting either of these words for the other two, it becomes manifest that the intention was only to exclude jurisdiction on the land, and not from within the body of a county, if the subject matter of dispute arose upon the sea, as, for instance, "within the flood mark." The Admiral had attempted to exercise jurisdiction on the land between high and low water mark when the tide was out, and also over dams and streams and ponds which were tideless, thereby depriving the Crown or the Lords of their accustomed perquisites. To remedy these abuses, and to put the question beyond doubt, it became necessary, two years later (2), to pass the 15 Richard II., c. 3. This statute is as follows:

"*Item*: At the great and grievous complaint of all the commons, made to our Lord the King in this present Parliament, for that the Admirals and their deputies do inroach to them divers jurisdictions, franchises, and many other profits pertaining to our Lord the King, and to other lords, cities and boroughs, other than they were wont, or ought to have of right, to the great oppression and impoverishment of all the commons of the land, and hindrance and loss of the King's profits, and of many other lords, cities and boroughs through the realm, it is declared, ordained and established, that of all manner of contracts, pleas and quarrels, and all other things rising within the bodies of the counties, as well by land as by water, and also of wreck of the sea, the Admiral's Court shall have no manner of cognizance, power nor jurisdiction; but all such manner of contracts, pleas and quarrels, and all other things rising within the bodies of counties, as well by land as by water, as afore, and also wreck of the sea, shall be tried, determined, discussed and remedied by the laws of the land, and not before nor by the Admiral, nor his lieutenant in any wise; nevertheless, of the death of a man, and of a mayhem, done in great ships, being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers, nigh to the sea, and in none other places of the same rivers, the Admiral shall have cognizance, and also to arrest ships in the great flotes for the great voyages of the King and the realm, saving always to the King all manner of forfeitures and profits thereof coming, and he shall have, also, jurisdiction upon the said flotes during the said voyages, only saving always to the lords, cities and boroughs their liberties and franchises."

(1) Benedict, Ad. (ed. 1894), 36.

(2) A. D. 1391.

Dr. Lane, a distinguished civilian, in his argument in *Degrave v. Hedges* (1), says: "The intent of the statutes of Richard II. was to restrain contracts of which the common law has a jurisdiction, as was apparent from the preamble; that the Admiralty had encroached upon the jurisdiction of the common law." Selden, in his *Mare Clausum*, c. 24, says: "That Edward III. settled the Admiralty, and restored and reduced it, and re-established the laws of Oleron, which were the Rhodian laws, by which the Romans governed themselves as to maritime affairs."

This statute also provided that a direct remedy might be had against the Admiral and his deputy by the person wrongfully pursued in the Court, and it remained in force until repealed by 24 Vict. c. 10, sec. 31. The statute of Henry IV. was a powerful weapon in the hands of the opponents of the Admiralty to restrict its jurisdiction within the narrowest bounds. It is true Mr. Benedict (2) thinks this statute was passed to preclude the narrow construction put upon the statutes of Richard II. However that may be, it is certain it had no such effect, for, in the language of Story, J., "It was upon these statutes that the controversies respecting the Admiralty were so zealously and obstinately maintained during more than two centuries." Devices of various kinds were resorted to by the common law lawyers to cut down the Admiralty jurisdiction. It was urged, and successfully, that generally the Admiralty could have no jurisdiction where the Common Law Courts had jurisdiction. The Admiralty Courts contended that the restraining statutes prohibited the Admiralty only from exercising jurisdiction of contracts arising wholly on the land, and of affairs not maritime in their nature, and torts or injuries committed in ports, and not within the ebb and flow of the tide. The Admiralty also contended it had jurisdiction, notwithstanding these statutes, over all torts and injuries committed on the high seas; in ports within the ebb and flow of the tide, and in great streams below the first bridges; over all maritime contracts arising at home or abroad; and over all matters of prize and its incidents. The Common Law Courts, on the other hand, held that the Admiralty jurisdiction was confined to contracts and affairs exclusively made and done upon the high seas, and to be executed there; that it had no jurisdiction over torts, offences or injuries done in ports within the bodies of counties, although within the ebb and flow of the tide; nor over any maritime contract made within the body of a county or beyond sea,

(1) 2 Ld. Ray. 1285.

(2) Benedict Ad. (3 ed.) 39.

although in a measure to be executed on the high seas; nor of contracts made on the high seas, to be executed on the land; nor touching things not in their nature maritime, such as a contract for the payment of money; nor of any contract, although maritime and made at sea, under seal or containing unusual stipulations. The Admiralty was comparatively helpless to assert its jurisdiction against the prohibitions granted against it by the Courts of Common Law. Edwards (1) says: "Jealousy is perhaps a mild word to apply to the passion with which the superior courts took up this question, for there appears to have been more greediness than emulation at the bottom of it. It is to be regretted that to no less illustrious personage than Lord Coke is to be ascribed the origin of this jealousy, and that being the case, it is not wonderful that others should, from subserviency to the opinion of so great a man, have followed in the same track, or even have gone beyond it, *imitatores servum pecus*."

In the reign of Elizabeth, in 1575, an agreement was come to between the Admiralty and common law judges, as to the exercise of their respective jurisdictions. The merchants loudly called out for a cessation of the dispute between the rival jurisdictions. A distinguished Admiralty judge said: "Betwixt land and water, between contracts made beyond sea and obligations made at sea, the Admiralty was like a kind of derelict." Two statutes were also passed in the reign of Elizabeth (2) relating to Admiralty jurisdiction. The latter statute, as set out by Lord Coke, in his 4th Institute, c. 22, p. 137, "describeth particularly the limits of the Lord Admiral's jurisdiction in these words. All and every such of the said offences before mentioned, as hereafter, shall be done on the main sea, or coast of the sea, being no part of the body of any county of this realm, and without the precincts, jurisdiction, and liberty of the Cinque ports, and out of any haven or pier, shall be tried and determined before the Lord Admiral, etc. So as by the judgment of the whole parliament the jurisdiction of the Lord Admiral is wholly confined to the main sea, or coasts of the sea being no parcel of the body of any county of this realm."

The agreement of 1575 was as follows:

"The request of the Judge of the Admiralty to the Lord Chief Justice of Her Majesty's bench and his colleagues, and the Judge's agreement, the 7th of May, 1575.

"*Request*: That after judgment or sentence definitive given in

(1) p. 17.

(2) 5 Eliz. c. 5, and 27 Eliz. c. 11.

the Court of the Admiralty, in any cause, and appeal made from the same to the High Court of Chancery, that it may please them to forbear granting of any writ of prohibition, either to the Judge of the said Court, or to Her Majesty's delegates, at the suit of him, by whom such appeal shall be made, seeing by choice of remedy that way, in reason he ought to be contented therewith, and not to be relieved any other way.

"Agreement: It is agreed by the Lord Chief Justice and his colleagues, that after sentence given by the delegates, no prohibition shall be granted; and yet if there be no sentence, if a prohibition be not sued within the next term following sentence in the Admiral Court, or within two terms next after, at the farthest, no prohibition shall pass to the delegates.

"Request: Also, that prohibition be not granted hereafter upon bare suggestions or surmises, without summary examination and proof made thereof wherein it may be lawful to the Judge of the Admiralty and the party defendant, by the favor of the Court, to have counsel, and to plead for the stay thereof, if there shall appear cause.

"Agreement: They have agreed that the Judge of the Admiralty, and the party defendant shall have counsel in Court, and plead the stay, if there may appear evident cause.

"Request: That the Judge of the Admiralty, according to such ancient order as hath been taken (2 Ed. 1) by the King and his council, and according to the letters patent of the Lord Admiral for the time being, and allowed of by other Kings of this land ever since, and by custom, time out of memory of man, may have and enjoy the cognition of all contracts, and other things arising, as well beyond as upon the sea, without any let or prohibition.

"Agreement: This is agreed upon by the said Lord Chief Justice and his colleagues.

"Request: That the said judge may have and enjoy the knowledge and breach of charter parties made between masters of ships and merchants, for voyages to be made to the parts beyond the seas, and to be performed upon and beyond the sea, according as it hath been accustomed, time out of mind, and according to the good meaning of the statute of 32 Henry VIII., c. 14, though the same charter parties happen to be made within the realm.

"Agreement: This is likewise agreed upon, for things to be performed either upon or beyond the seas, though the charter party be made upon the land, by the statute of 32 Henry VIII., c. 14.

“Request: That writs of *corpus cum causa* be not directed to the said judge in causes of the nature aforesaid; and if any happen to be directed, that it may please them to accept the return thereof, with the cause, and not the body, as it hath always been accustomed.

“Agreement: If any writ of this nature be directed in the causes before specified, they are content to return the bodies again to the Lord Admiral’s goal, upon certificate made of the cause to be such, or if it be for contempt, or disobedience done to the Court in any such cause.”

The Queen does not appear to have been a party to the agreement of 1575, but it is clear the Admiral and the Judge of the Court considered it binding, because assented to by the common law judges. There is also abundant evidence to support the position that Elizabeth was disposed to support the jurisdiction of the Court. In the record office is a letter from the Queen to the Chief Justice of England with reference to the jurisdiction, written in 1584. It runs as follows: “After my hartie commendations to your Lordship and the rest: Whereas there hath been and yet is depending in the Court of the Admiralty matter between one Percie, of Norfolke, and a certaine Portingall, wherein the said Percie sueth to the Court of her Majesty’s Bench for a prohibition against the said Portingall or his Attornie for that this cause is said to be determined properly by the civill law and in the Admiraltie, Her Majesty’s pleasure is and soe hath her Highness willed me to signify unto you that your Lordship and the rest of you associate Judges of the said Court have a speciall care not only in this matter of Percie and the Portingall, but in all other like matters concerning the Admiraltie, that the same being triable by mere civill lawe be not admitted to triall before you at the common law, which of those marine and forraine causes is thought not soe properly and aptly to take knowledge; and therefore that hereafter (unlesse the matter shall appeare soe manifestly to be triable by the common lawe as that you may and will so warrant it) that you would remit the same to the ordinarie place of the Admiraltie, the credit of which Court for many good respects her Majestie would have by all good meanes preserved: And soe I recommend your Lordship and the rest most heartily to God; from the Court the VIIIth of July, 1584.”

This letter is signed by Walsingham, who was Secretary of State. Fourteen years later the Queen addressed the following letter to the Mayor and Sheriffs of London on the same subject: “Right trusty, etc.: Whereas wee are given to understand by our right

trustie, etc., Charles, Earl of Nottingham, our high Admirall, that you take upon to heare and determine all manner of causes and suites arising of contracts and other things happening as well upon as beyond the seas by attachments or otherwise, the knowledge whereof doth properly and specially belong and appertaine unto our Court of Admiraltie, fayning the same contrary to the truth, to have been done within some parish or woarde of that our citie of London; like as wee think it very strange that by such untrue surmises the prerogative and jurisdiction of our said Court of Admiralty should be usurped by you, and our said Admirall and his Lieutenant defrauded of that which is due unto them; soe wee thought it meete straightly to charge and command you to forbear to intermeddle with any matter, cause or suite proceeding of any contract or other thing happening upon or beyond the seas, or in any other place within the jurisdiction of the Admiralty. And if it shall happen any such cause or matter to be commenced before you by any counsellor or attorney without your knowledge, wee require you, when you shall know thereof by yourself or upon advertisement had by our said Admirall or from his Lieutenant to desist to proceed therein further. And hereof faile you not as you and every of you tender our pleasure. Given, etc., at Greenwich, the 16th day of May, 1598. *Anno regni Regine 40.*"

During the Queen's life, from the time of the agreement of 1575, it is asserted that only two or three prohibitions were granted; but after her death the old rivalry between the Courts again came to the front. James I. was disposed to support the position taken by his predecessor, for we find that the King, in 1604, a year after the Queen's death, addressed a letter to the Lord Mayor and Sheriffs of London of the same tenor and effect as the letter of 1598. The Courts of Common Law, however, pressed their views, and the restrictions sought to be imposed upon the Admiralty became so irritating that an appeal was made to the King. The requests and agreements of 1575 were read over before James I., February 11, A. D. 1611. All the judges were present. The King directed that Dr. Dunn, the Admiralty judge, should draw up in specific statements the grievances complained of, and that those statements should be handed to the judges for their answers. The answers were drawn by Coke himself, and "they breathe his imperious spirit." He denied the binding force of the agreement because it was "not subscribed with the hand of any judge." The objections and answers are set forth at length in Coke's 4th Institute, c. 22, p. 134, and are as follows:

"Articuli Admiralitatis.

"The complaint of the Lord Admiral of England to the King's Most Excellent Majesty, against the Judges of the realm, concerning prohibitions granted to the Court of the Admiralty, 11 *die Febr. penultimo die Termini Hilarii, Anno 8 Jac. Regis*: The effect of which complaint was after, by His Majesty's commandment, set down in articles by Dr. Dun, Judge of the Admiralty, which are as followeth, with answers to the same by the Judges of the realm, which they afterwards confirmed by three kinds of authorities in law; 1st, by Acts of Parliament; 2nd, by judgments and judicial proceedings; and lastly, by book cases — Certain grievances whereof the Lord Admiral and his officers of the Admiralty do especially complain and desire redress.

"*First Objection* — That whereas the conusance of all contracts and other things done upon the sea belongeth to the Admiral jurisdiction, the same are made triable at the common law, by supposing the same to have been done in Cheapside, and such places.

"*The Answer* — By the laws of this realm the Court of the Admiral hath no conusance, power or jurisdiction of any manner of contract, plea or querele within any county of the realm, either upon the land or the water; but every such contract, plea or querele, and all other things rising within any county of the realm, either upon the land or the water, and also wreck of the sea, ought to be tried, determined, discussed and remedied by the laws of the land, and not before or by the Admiral, nor his lieutenant, in any manner. So as it is not material whether the place be upon the water, *infra fluxum et refluxum aquæ*, but whether it be upon any water within any county. Wherefore we acknowledge that of contracts, pleas and querels made upon the sea, or any part thereof which is not within any county (from whence no trial can be had by twelve men), the Admiral hath, and ought to have, jurisdiction. And no precedent can be showed that any prohibition hath been granted for any contract, plea or querele concerning any marine cause made or done upon the sea, taking that only to be the sea wherein the Admiral hath jurisdiction, which is before by law described to be out of any county. (See more of this matter in the answer to the sixth Article.)

"*Second Objection* — When actions are brought in the Admiralty upon bargains and contracts made beyond the seas, wherein the common law cannot administer justice, yet in these cases prohibitions are awarded against the Admiral Court.

"*The Answer* — Bargains or contracts made beyond the seas, wherein the common law cannot administer justice (which is the

effect of this Article), do belong to the constable and marshal—for the jurisdiction of the Admiral is wholly confined to the sea, which is out of any county. But if any indenture, bond or other specialty, or any contract be made beyond sea, for doing of any act or payment of any money within this realm, or otherwise, wherein the common law can administer justice, and give ordinary remedy; in these cases neither the constable and marshal, nor the Court of the Admiralty hath any jurisdiction. And, therefore, when this Court of the Admiralty hath dealt therewith in derogation of the common law, we find that prohibitions have been granted, as by law they ought.

“Third Objection—Whereas, time out of mind, the Admiral Court hath used to take stipulations for appearance and performance of the acts and judgments of the same Court, it is now affirmed by the judges of the common law that the Admiral Court is no Court of Record, and therefore not able to take such stipulations; and hereupon prohibitions are granted to the utter overthrow of that jurisdiction.

“The Answer—The Court of the Admiralty proceeding by the civil law is no Court of Record, and therefore cannot take any such recognizance as a Court of Record may do. And for taking of recognizances against the laws of the realm, we find that prohibitions have been granted, as by the law they ought. And if an erroneous sentence be given in that Court, no writ of error, but an appeal before certain delegates doth lie, as it appeareth by the statute of 8 Eliz. Reginae, cap. 5, which proveth that it is no Court of Record.

“Fourth Objection—That charter parties made only to be performed upon the seas are daily withdrawn from that Court by prohibitions.

“The Answer—If the charter party be made within any city, port, town or county of this realm, although it be to be performed either upon the seas, or beyond the seas, yet is the same to be tried and determined by the ordinary course of the common law, and not in the Court of the Admiralty. And therefore when that Court hath encroached upon the common law in that case, the Judge of the Admiralty and the party suing there have been prohibited, and oftentimes the party condemned in great and grievous damages by the laws of the realm.

“Fifth Objection—That the clause of *Non obstante statuto*, which hath foundation in His Majesty's Prerogative, and is current in all other grants, yet in the Lord Admiral's Patent is said to be of no

force to warrant the determination of the causes committed to him in His Lordship's Patent, and so rejected by the judges of the common law.

"*The Answer*—Without all question the statutes of 13 R. 2, cap. 3, 15 R. 2, cap. 5, and 2 H. 4, cap. 11, being statutes declaring the jurisdiction of the Court of the Admiral, and wherein all the subjects of the realm have interest, cannot be dispensed with by any *non obstante*, and therefore not worthy of any answer; but by color thereof, the Court of the Admiralty hath, contrary to those Acts of Parliament, inroached upon the jurisdiction of the common law, to the intolerable grievance of the subjects, which hath oftentimes urged them to complain in your Majesty's Courts of ordinary justice at Westminster, for their relief in that behalf.

"*Sixth Objection*—To the end that the Admiral jurisdiction may receive all manner of impeachment and interruption, the rivers beneath the first bridges, where it ebbeth and floweth, and the ports and creeks are, by the judges of the common law, affirmed to be no part of the seas, nor within the Admiral jurisdiction; and thereby prohibitions are usually awarded upon actions depending in that Court, for contracts and other things done in those places, notwithstanding that by use and practice time out of mind, the Admiral Court have had jurisdiction within such ports, creeks and rivers.

"*The Answer*—The like answer as to the first. And it is further added that for the death of a man, and of mayhem (in those two cases only) done in great ships, being and hovering in the main stream only beneath the points of the same rivers nigh to the sea, and no other place of the same rivers, nor in other causes, but in those two only, the Admiral hath cognizance. But for all contracts, pleas and querels made or done upon a river, haven, or creek, within any county of this realm, the Admiral without question, hath not any jurisdiction, for then he should hold plea of things done within the body of the county, which are triable by verdict of twelve men, and merely determinable by the common law, and not within the Court of the Admiralty, according to the civil law. For that were to change and alter the laws of the realm in those cases, and make these contracts, pleas and querels triable by the common laws of the realm, to be drawn *ad aliud examen*, and to be sentenced by the Judge of the Admiralty according to the civil laws. And how dangerous and penal it is for them to deal in these cases, it appeareth by judicial precedents of former ages. But see the answer to the first article.

*“Seventh Objection—*That the agreement made in *Anno Domini* 1575, between the Judges of the King’s Bench and the Court of the Admiralty, for the more quiet and certain execution of Admiral jurisdiction, is not observed as it ought to be.

*“The Answer—*The supposed agreement mentioned in this article hath not as yet been delivered unto us, but having heard the same read over before His Majesty (out of a paper not subscribed with the hand of any judge), we answer that for so much thereof as differeth from these answers, it is against the laws and statutes of this realm, and therefore the judges of the King’s Bench never assented thereunto, as is pretended, neither doth the phrase thereof agree with the terms of the laws of the realm.

*“Eighth Objection—*Many other grievances there are which, in discussing of these former, will easily appear worthy also of reformation.

*“The Answer—*This article is so general as no particular answer can be made thereunto, only that it appeareth by that which hath been said that the Lord Admiral, his officers and ministers, principally by colour of the said void *non obstante* and for want of learned advice, have unjustly incroached upon the common laws of this realm, whereof the marvail is the less, for that the Lord Admiral, his lieutenants, officers and ministers, have, without all colour, incroached and intruded upon a right and prerogative due to the Crown, in that they have seized and converted to their own uses goods and chattels of infinite value taken by pirates at sea, and other goods and chattels which in no sort appertain unto his lordship by his letters patents, wherein the said *non obstante* is contained, and for the which he and his officers remain accountable unto His Majesty. And they, now wanting in this blessed time of peace, causes appertaining to their natural jurisdiction, incroach upon the jurisdiction of the common law, lest they should sit idle and reap no profits. And if a greater number of prohibitions (as they affirm) have been granted since the great benefit of this happy peace than before in time of hostility, it moveth from their own incroachments upon the jurisdiction of the common law. So as they do not only unjustly incroach, but complain also of the Judges of the Realm for doing of justice in these cases.”

It is not necessary to refer at any length to the above objections and answers. They cover the entire field of dispute between the rival Courts. The great objection to and jealousy of the Admiralty jurisdiction arose from the fact that its procedure was based upon

that of the civil law, and that causes were determined without the intervention of a jury. Our Anglo-Saxon forefathers ever evinced a tenacious devotion to the principle of trial by jury, and as this feature did not obtain in Equity and Admiralty proceedings, both of these Courts encountered strong opposition. Both encountered the active, unyielding antipathy of Lord Coke. The Equity Court triumphed, but the Admiralty had finally to abandon its ancient jurisdiction. Even the study of the civil law was discountenanced. As early as the middle of the twelfth century King Stephen silenced Vacarius, a distinguished Lombard jurist, who had established a school of civil law at Oxford. In the answer to the third objection, it is put forward that the Admiralty, proceeding by the civil law, is no Court of Record. A Court of Record is one having power to fine and imprison. In Bacon's Abridgement (1) it is laid down that every Court, by having power given to it to fine and imprison, and whose proceedings may be reversed by writ of error or *certiorari*, is one of record. Why a Court proceeding according to the civil law is not one of record is not quite apparent, and Mr. Justice Story, it is submitted, completely disproves this statement of Lord Coke.

The ordinance of Richard I., at Grimsby (2), in words declares the Admiralty to be of record. And the same writer, in a note on the same page, says that in the Record Office there is a manuscript labelled "*Placita in Cur. Admiralitat. 15 R. II.*" showing it to be a Court of Record at that time. In the same work (3), under the title *De Officio Admiralitatis*, the language is, "*eo quod admirallus et locumtenentes sui sunt de recordo.*" The Common Law Courts, however, held it was not a Court of Record, and that continued until Parliament intervened, and in 1861 (4), in express terms, declared the Court to be one of record. The application to James I., in 1611, resulted in nothing favorable to the Admiralty jurisdiction. Prohibitions continued to be issued to restrain the Court, and nothing further was done until the time of Charles I., in 1632. Sir Henry Martyn was then the Judge, and he urged before the King and his Council the need of an agreement among the parties concerned as to the limits within which the Common Law Courts would allow the exercise of jurisdiction without interference. An agreement was at length reached. It was read in Council before the King, agreed to, and signed by the lords of Council and the judges. The following is the agreement :

(1) Tit. Courts, D. 2.

(2) 1 Twiss, 67.

(3) 1 Twiss, p. 237.

(4) 24 Vict., c. 10, s. 14.

"At Whitehall, 18th of February, 1632.

"This day his Majesty being present in Council, the articles and propositions following for the accommodating and settling of the differences concerning prohibitions, arising between his Majesty's Courts of Westminster, and his Court of Admiralty, were fully debated, and resolved by the Board. And were then likewise upon reading the same as well before the judges of his Highness's said Courts at Westminster as before the judge of his said Court of Admiralty, and his attorney-general, agreed unto and sub-signed by them all in his Majesty's presence, and the transcript thereof ordered to be entered into the register of Council Causes and the original to remain in the Council chest.

"1. If suit shall be commenced in the Court of Admiralty upon contracts made, or other things personally done beyond the seas, or upon the sea, no prohibition is to be awarded.

"2. If suit be before the Admiral for freight, or mariners' wages, or for the breach of charter parties for voyages to be made beyond the sea, though the charter parties happen to be made within the realm, and although the money be payable within the realm, so as the penalty be not demanded, a prohibition is not to be granted; but if suits be for the penalty, or if question be made whether the charter partie were made or not; or whether the plaintiff did release or otherwise discharge the same within the realm, that is to be tried in the King's Courts at Westminster, and not in the King's Court of Admiralty, so that first it be denied upon oath, that a charter partie was made, or a denial upon oath tendered.

"3. If suit shall be in the Court of Admiralty for building, amending, saving or necessary victualling of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself a party, no prohibition is to be granted, though this be done within the realm.

"4. Likewise the Admiral may inquire of, and redresse all annoyances and obstructions in all navigable rivers, beneath the first bridges, that are any impediments to navigation, or passage to, and from the sea, and also try personal contracts and injuries done there, which concern navigation upon the sea, and no prohibition is to be granted in such cases.

"5. If any be imprisoned, and upon *habeas corpus*, if any of these be the cause of imprisonment, and that be so certified, the partie shall be remanded."

These resolutions are not printed in the same terms in all the books. As they appear above they are taken from Prynne (1). The second and fourth resolutions are somewhat different as given by Browne (2). The reader will note that these resolutions conceded to the Admiralty a jurisdiction full and ample, and in accordance with its ancient claims, a jurisdiction much larger than was subsequently allowed. Modern legislation, however, meeting the requirements of modern commerce, has granted all the jurisdiction conceded by the resolutions of 1632, and very much in addition. All writers on Admiralty jurisdiction point out that these resolutions were printed in the first and second editions of Croke's reports, but omitted from later editions after his death. The reporter, Sir George Croke, was one of the judges who signed the resolutions. We have the authority of Sir Leoline Jenkins for the statement that the agreement of 1632 "was punctually observed as to the granting or denying prohibitions" till the time of the Commonwealth. And in Cromwell's time these resolutions were in substance re-enacted by an ordinance of parliament in 1648. The following is the ordinance (3):

(1) See Edwards' Ad. p. 23; Benedict Ad. (3 ed.) p. 51.

(2) 2 Browne Civ. and Ad. Law, 1st Am. ed. 78.

"2. If suit be before the Admiral for freight or mariners' wages, or for breach of charter parties, for voyages to be made beyond the seas; though the charter party happen to be made within the realm, so as the penalty be not demanded, or prohibition is not to be granted; but if the suit be for the penalty; or if the question be, whether the charter party were made or not, or whether the plaintiff did release or otherwise discharge the same within the realm; this is to be tried in the King's Courts at Westminster, and not in his Court of Admiralty."

"4. Although of some of those causes arising upon the Thames beneath the first bridge, and divers other rivers beneath the first bridge, the King's Courts have cognizance; yet the Admiralty has jurisdiction there in the points specially mentioned in the statute of 15 Richard II. And also by exposition of equity thereof he may inquire and redress all annoyances and obstructions in these rivers that are any impediment to navigation or passage to or from the sea; and also may try personal contracts or injuries done there, which concern navigation upon sea. And no prohibition is to be granted in such cases."

Dunlap, in his work on Admiralty, follows Browne, and the latter has copied from Zouch on Admiralty jurisdiction.

(3) This ordinance is taken from Scobell's Collection of Acts, etc., c. 112, p. 147. See also Dunlap Ad. (2 ed.) p. 36; Benedict Ad. (3 ed.) p. 51.

"The Jurisdiction of the Court of Admiralty Settled.

"The Lords and Commons assembled in Parliament, finding many inconveniences daily to arise in relation both to the trade of this Kingdom and the commerce with foreign parts, through the uncertainty of jurisdiction in the trial of maritime causes, do ordain, and be it ordained by the authority of Parliament, that the Court of Admiralty shall have cognizance and jurisdiction against the ship or vessel, with the tackle, apparel and furniture thereof; in all causes which concern the repairing, victualling and furnishing provisions for the setting of such ships or vessels to sea; and in all cases of bottomry, and likewise in contracts made beyond the seas concerning shipping or navigation, or damages happening thereon or arising at sea in any voyage; and likewise in all cases of charter-parties, or contracts for freight, bills of lading, mariners' wages, or damages in goods laden on board ships, or other damages done by one ship or vessel to another, or by anchors or want of laying of buoys; except, always, that the said Court of Admiralty shall not hold pleas or admit actions upon any bills of exchange or accounts betwixt merchant and merchant or their factors.

"And be it ordained, that in all and every the matters aforesaid the said Admiralty Court shall and may proceed, and take cognizance in due form, and hear, examine, and finally end, decree, sentence and determine the same according to the laws and customs of the sea, and put the same decrees and sentences in execution, without any let, trouble or impeachment whatsoever, any law, statute or usage to the contrary heretofore made in any wise notwithstanding; saving always and reserving to all and every person and persons that shall find or think themselves aggrieved by any sentence definitive, or decree having the force of a definitive sentence, or importing a damage not to be repaired by the definitive sentence given or interposed in the Court of Admiralty in all or any of the cases aforesaid, their right of appeal in such form as hath heretofore been used from such decrees or sentences in the said Court of Admiralty.

"Provided always, and be it further ordained by the authority aforesaid, that from henceforth there shall be three judges always appointed of the said Court, to be nominated from time to time by both Houses of Parliament or such as they shall appoint; and that every of the judges of the said Court for the time being, that shall be present at the giving of any definitive sentence in said Court, shall at the same time or before such sentence given, openly in Court, deliver his reasons in law of such his sentence or of his opinion concerning the same; and shall also openly in Court give

answers and solutions (as far as he may) to such laws, customs, or other matters, as shall have been brought or alleged in Court on that part against whom such sentence or opinion shall be given or declared respectively.

"Provided also, that this ordinance shall continue for three years and no longer."

Although this ordinance at first was intended to last for three years, it was subsequentially made perpetual, but at the restoration in 1660 it was repealed. The use of the Latin language was abolished in the Court by Cromwell, but the following entry in the Admiralty Assigment Book, dated August 1st, 1660, refers to the restoration of Charles II. to the throne, and of the Latin language to the Court: "*Primo die mensis Augusti Anno Domini millesimo et sexcentesimo anno scilicet jubileo non solum lingue Latinæ feliciter restitute sed et Illustrissimi principis Caroli secundi a populo suo diu per Proditores depulsi, nunc mirandæ Dei providentia restaurati, quem Deus optimus Max. diutissime servet incolumem*" (1). The Latin language continued from that time in use in the Court till 1733, when it was abolished, and since then the English language has been used.

From time immemorial there has been an Instance Court of Admiralty in Ireland. Since 1782 no prize commission has been given to the judge of that Court. By the Act of Union it is provided that there shall be an Instance Court of Admiralty for the "determination of causes civil and maritime only."

The Admiralty jurisdiction in Scotland was always large and comprehensive. When Story, J., delivered his judgment in *DeLovio v. Boit*, nearly eighty years ago, it had cognizance of "all complaints, contracts, offences, pleas, exchanges, assecurations, debts, counts, charter-parties, covenants, and all other writings concerning lading and unlading of ships, freights, hires, money lent upon casualties and hazard at sea, and all other businesses whatsoever among sea-farers done at sea, this side sea or beyond sea; the cognition of writs of appeal from other judges, and the causes and actions of reprisal, and letters of mark; and to take stipulations, cognoscions, and insinuations in the books of the Admiralty." And it is claimed by writers of authority that the Vice-Admiralty Courts of the American colonies prior to 1776 possessed and exercised very extensive Admiralty jurisdiction. This is evidenced by the wide powers given to the different judges by their commissions.

(1) Marsden's Ad. Cases, 243.

As late as 1554 there were no Admiralty judges in France except the Admiral's lieutenants and other officers appointed by him. Henry II. at that time organized Courts of Admiralty, and since 1717 they have been generally extended throughout the French colonies. By some, Louis the Fourteenth may be thought deserving of remembrance on account of his splendid military achievements, but the greatest monument to his fame is his enlightened *Ordonnance de la Marine*, in which is defined the jurisdiction of the Courts of Admiralty in France. The following, taken from Valin's *Commentaire sur l'Ordonnance de la Marine du mois d'Aout*, 1681, vol. 1, p. 6 (ed. 1828), by V. Bécane, will enable the reader to judge of this comprehensive and enlightened code:

TITRE II.

DE LA COMPÉTENCE DES JUGES DE L'AMIRAUTÉ.

1. Les juges de l'amirauté connaîtront privativement à tous autres, et entre toutes personnes de quelque qualité qu'elles soient, même privilégiées, français et étrangers, tant en demandant qu'en défendant, de tout ce qui concerne la construction, les agrès et appareaux, avitaillement et équipement, ventes et adjudications des vaisseaux.

2. Déclarons de leur compétence toutes actions qui procèdent de chartes-parties, affrètemens ou nolissemens, connoissemens ou polices de chargement, fret ou nolis, engagement ou loyer de matelots, et des victuailles qui leur seront fournies pour leur nourriture, par ordre du maître, pendant l'équipement des vaisseaux, ensemble des polices d'assurances, obligations à la grosse aventure, ou à retour de voyage, et généralement de tous contrats concernant le commerce de la mer, nonobstant toutes soumissions et privilèges à ce contraires.

3. Connaîtront aussi des prises faites en mer, des bris, naufrages et échouemens, du jet et de la contribution, des avaries et des dommages arrivés aux vaisseaux et aux marchandises de leur chargement, ensemble des inventaires et délivrances des effets délaissés dans les vaisseaux de ceux qui meurent en mer.

4. Auront encore la connaissance des droits de congé, tiers, dixième, balises, ancrage et autres appartenant à l'amiral, ensemble de ceux qui seront levés ou prétendus par les seigneurs ou autres particuliers voisins de la mer, sur les pêcheries ou poissons, et sur les marchandises ou vaisseaux sortant des ports ou y entrant.

5. La connaissance de la pêche qui se fait en mer, dans les étangs salés et aux embouchures des rivières, leur appartiendra : comme

aussi celle des parcs et pêcheries, de la qualité des rets et filets, et des ventes et achats de poisson dans les bateaux, ou sur les grèves, ports et havres.

6. Connaîtront pareillement des dommages causés par les bâtimens de mer, aux pêcheries construites même dans les rivières navigables, et de ceux que les bâtimens en recevront, ensemble des chemins destinés pour le halage des vaisseaux venant de la mer, s'il n'y a règlement, titre ou possession contraires.

7. Connaîtront encore des dommages faits aux quais, digues, jetées, palissades et autres ouvrages faits contre la violence de la mer, et veilleront à ce que les ports et rades soient conservés dans leur profondeur et netteté.

8. Feront la levée des corps noyés, et dresseront procès-verbal de l'état des cadavres trouvés en mer, sur les grèves ou dans les ports; même de la submersion des gens de mer étant à la conduite de leurs bâtimens dans les rivières navigables.

9. Assisteront aux montres et revues des habitans des paroisses sujettes au guet de la mer, et connaîtront de tous différens qui naîtront à l'occasion du guet; comme aussi des délits qui seront commis par ceux qui feront la garde des côtes, tant qu'ils seront sous les armes.

10. Connaîtront pareillement des pirateries, pillages et désertions des équipages, et généralement de tous crimes et délits commis sur mer, ses ports, havres et rivages.

11. Recevront les maîtres des métiers de charpentier de navires, calfateur, cordier, trevier, voilier et autres ouvriers travaillant seulement à la construction des bâtimens de mer et de leurs agrès et apparaux, dans les lieux où il y aura maîtrise, et connaîtront des malversations par eux commises dans leur art.

12. Les rémissions accordées aux roturiers pour crimes dont la connaissance appartient aux officiers de l'amirauté, seront adressées et jugées ès sièges de l'amirauté ressortissant nûment en nos cours de parlement.

13. Les officiers des sièges généraux de l'amirauté aux tables de marbre connaîtront, en première instance, des matières tant civiles que criminelles contenues en la présente ordonnance, quand il n'y aura pas de sièges particuliers dans le lieu de leur établissement, et par appel, hors les cas où il écherrait peine afflictive, auquel cas sera notre ordonnance de 1670 exécutée.

14. Pourront évoquer des juges inférieurs, les causes qui excéderont la valeur de trois mille livres, lorsqu'ils seront saisis de la matière par l'appel de quelque appointement ou interlocutoire donné en première instance.

15. Faisons défenses à tous prévôts, châtelains, viguiers, baillis, sénéchaux, présidiaux et autres juges ordinaires, juges-consuls, et des soumissions aux gens tenant les requêtes de notre hôtel et du palais, et à notre grand conseil, de prendre aucune connaissance des cas ci-dessus, circonstances et dépendances; et à nos cours de parlement d'en connaître en première instance; même à tous négocians, mariniers et autres, d'y procéder pour raison de ce, à peine d'amende arbitraire.

The French Code of 1681, from which the above is taken, was published under the auspices of Colbert, the great minister of Louis XIV. Judge Duer claims for it a higher place than any code at that time known. He says: (1) "It is probably the first complete code of maritime and commercial law that was ever attempted to be framed, and when we consider the originality and extent of the design, and the ability with which it is executed, we shall not hesitate to admit that it deserves to be ranked among the noblest works that legislative genius and learning have yet accomplished."

In addition to the jurisdiction of the instance and prize sides of the Courts, the Lord High Admiral exercised a criminal jurisdiction over all crimes and offences committed on the sea, or on the coasts out of the body of any county, and of death or mayhem in great ships being or hovering in the main stream of great rivers below the bridges of the same. The offence of piracy was formerly only cognizable by the Admiralty Courts which proceeded, as we have seen, without a jury, according to the procedure of the civil law. It was, however, felt to be inconsistent with the liberties of the nation that any man's life should be taken away except by the judgment of his peers or the common law of the land. As a result the statute 28 Hen. VIII. c. 15, was passed to obviate these objections, and a new jurisdiction was thereby established. It was enacted:

"1. That all treasons, felonies, robberies, murders, and confederacies hereafter to be committed in or upon the sea, or in any other haven, river, creek, or place where the Admiralty or Admirals have

(1) *Mar. Ins.*, vol. 1, p. 43.

or pretend to have power, authority, or jurisdiction, shall be inquired, tried, heard, determined, and judged in such shires and places in the realm as shall be limited in the King's commission or commissions, to be directed for the same in like form and condition as if any such offence or offences had been committed or done in or upon the land.

"2. That such persons to whom such commission or commissions shall be directed, or four of them at least, shall have full power and authority to inquire of such offences and every of them by the oaths of twelve good and lawful inhabitants in the shire, limited in their commission in such manner and form as if such offences had been committed upon the land within the same shire; and that every indictment found and presented before such commissions of any treasons, felonies, robberies, murders, manslaughterers, or such other offences committed or done in or upon the seas, or in or upon any haven, river, or creek, shall be good and effectual in law."

The judge of the Admiralty Court was always included among the commissioners appointed under the above statute, and this jurisdiction was ultimately exercised by the Central Criminal Court, which was established by 4 & 5 Wm. 4, c. 36. By 7 & 8 Vict. c. 2, all commissioners of Oyer and Terminer or general gaol delivery were given all the powers commissioners had under 28 Hen. 8 as to the trial of offences committed at sea (1). An important question arose under the statutes relating to criminal jurisdiction in 1876 in the case of *The Queen v. Keyn* (2), in which it was held that prior to 28 Hen. 8, c. 15, the Admiral had no jurisdiction to try offences committed by foreigners on board foreign ships, whether within or without the limit of three miles from the shore of England; that this and the subsequent statutes only transferred to the Common Law Courts and the Central Criminal Court the jurisdiction formerly possessed by the Admiral; and that therefore, in the absence of statutory enactment, the Central Criminal Court had no power to try such an offence. The able arguments of counsel and the wealth of learning and research contained in the judgments of the different members of the Court especially recommend this case to the careful consideration of every student of this department of legal learning.

The defect of "absence of statutory enactment" was remedied in 1878, when it was provided by The Territorial Waters Jurisdiction Act, c. 73, that an offence committed by a person, whether a

(1) See 2 Stephen's His. Crim. Law, 21.

(2) 2 Ex. D. 63.

subject of Her Majesty or not, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly.

Reference has already been made to the ordinance passed in the time of the Commonwealth to fix and determine the Admiralty jurisdiction. This ordinance at the Restoration was set aside, but an effort was made shortly after to re-enact it into a law by Parliament. Sir Leoline Jenkins, the distinguished Admiralty judge, supported the bill with great power and erudition at the Bar of the House of Lords, but it failed to become law, and from that time to the reign of Queen Victoria the instance side of the Court sunk into comparative insignificance. It had, rightly or wrongly, been shorn of its ancient jurisdiction by a liberal use of writs of prohibition in the hands of the Common Law Courts. In the language of a distinguished judge, "The most animated advocates of the Admiralty do not deny this. They mourn bitterly over its fall, but uniformly acknowledge that they are eulogizing the dead" (1). As we shall see hereafter, the dead has been brought to life again by the wise and vivifying influences of modern legislation. The wars in the time of George the Third gave abundant business to the prize side of the Court. Happily it was at that time presided over by Lord Stowell, whose learning and character gave the High Court of Admiralty of England a commanding reputation among civilized nations. His judgments, expressed in chaste and polished English, are storehouses of learning upon questions of international and maritime law.

As a result of the restrictions placed upon the Court, its jurisdiction became limited to cases of prize, mariners' wages, bottomry bonds, suits in certain cases to recover possession of a ship, salvage, injuries to person or property by collision on the high seas, the arrest of goods or their proceeds piratically taken, and the enforcement of foreign Admiralty judgments under certain conditions. The wrongful possession of a ship, a dispute as to employment of the vessel, a suit for an account between part owners, a compulsory sale of a ship even at the request of the majority interest, were questions beyond the jurisdiction of the Court to settle. It could compel a bond to be given to a dissentient part owner for the safe return of the ship, but in those cases the dissentient owner derived

(1) per Johnson, J., in *Ramsay v. Allegre*, 12 Wheaton, p. 628.

no benefit from the fruits of the voyage, and shared in no losses. Thus matters continued till near the close of the first half of the present century. When Lord Stowell became judge, the business was so slight that it is said to have given him "little else than an occasional morning's occupation." And when those practising in the Court proposed the regular publication of its Reports, the judge hesitated, as "he feared lest the Reports should expose the nakedness of the land." Its business became still less under Lord Stowell's immediate successors, but there was a revival after Dr. Lushington was appointed judge. The fame of Lord Stowell naturally directed attention to the Court, and his admirable judgments on its prize side stimulated the desire of the mercantile interests to have their disputes touching maritime affairs settled by the instance side of the Court. The expanding commerce of the Empire, and the consequent growing intercommunication with all parts of the world, intensified that desire. It was important that a tribunal should be available capable of administering speedy justice, and upon equitable principles. And according to Lord Stowell, the Admiralty Court is "bound by its commission and constitution to determine the cases submitted to its cognizance upon equitable principles, and according to the rules of natural justice"; *The Juliana* (1). This feeling found expression in the report of a select committee of the House of Commons in 1833, recommending an extension of the jurisdiction. That report, however, fell far short of what has since been granted. Nothing was done, however, until 1840, when, by 3 & 4 Vict. c. 65, the first step was taken by legislation to restore to the Court its ancient jurisdiction. Advocates, barristers, and other officers were by that Act authorized to practice in the Court; claims of mortgagees were allowed to be pressed against any ship under arrest, or when the proceeds were in the registry; authority was given to the Court to decide all questions of title to any ship; also all questions of salvage, damage, wages or bottomry instituted in the Court after the passing of the Act. By another section power was conferred to adjudicate upon all claims and demands in the nature of salvage for services rendered to any ship, or for damage received by any ship, or in the nature of towage, or for necessities supplied to any ship or sea-going vessel; and this whether such ship or vessel was within the body of a county or on the high seas when the services were rendered or damage received or necessities furnished. The liability of the judge for error

(1) 2 Dod. 521.

of judgment, imposed by 2 Hen. IV. c. 11, was placed in the same category as the liability of the judges of Her Majesty's Superior Courts of Common Law, and (to anticipate) this unjust and invidious statute was subsequently entirely repealed by the 24 Vict. c. 10, s. 31. Certain other amendments were made as to appeals, taking evidence, enforcing the attendance of witnesses, making rules of Court, and granting or refusing new trials. The legislature, however, was careful to provide that the increased jurisdiction given to the Admiralty should not in any way interfere with the exercise of concurrent jurisdiction by the Courts of Common Law and Equity in respect of the same subject matters. There were a few exceptions, however, over which the Admiralty continued to have exclusive jurisdiction. Power was given the judge to make rules to improve the practice of the Court, and Dr. Lushington, under that authority, framed the rules of 1855. Under these rules it was first required to file preliminary acts in cases of collision. The same procedure has been continued by the rules of 1859, and subsequent rules under the Judicature Acts. In 1859, the statute 22 & 23 Vict. c. 6, was passed, which gave permission to sergeants, barristers, attorneys and solicitors to practice in the High Court. The jurisdiction of the High Court in England was still further enlarged by the Admiralty Act, 1861, which, according to Dr. Lushington, in part at least restored its ancient jurisdiction.

This latter statute conferred upon the High Court jurisdiction to entertain claims for building, equipping and repairing vessels; for necessities supplied; for damage to cargo imported; for claims arising out of breach of charter parties and bills of lading; for damage done by any ship; to decide questions of ownership, possession, employment and earning of any vessel registered in England or Wales; to settle all accounts between co-owners with power to sell the vessel or any share thereof; salvage of life or property; wages and disbursements of the master; wages of any seaman whether earned under a special contract or not. In certain cases the High Court of Admiralty shall have the same powers over any British ship, or any share therein, as are conferred upon by the High Court of Chancery in England under certain sections of the Merchant Shipping Act, 1854. The above enumeration embraces the principal subjects dealt with by the Admiralty Act of 1861. The thirty-fourth section makes provision for certain procedure as to hearing after the institution of a cross cause in cases of collision, but under the Judicature Acts in England a defendant was permitted to set up any defence by way of counter claim, which formerly could have

been set up by a cross action. The proceeding by way of counter claim came in with the Judicature Acts. The defendant, however, even yet may, if so disposed, decline to counter claim, await the result of the action against him, and then institute his suit for damages.

The enlargement of the jurisdiction in England proved so beneficial, that it was deemed expedient to enlarge the jurisdiction of the Vice-Admiralty Courts. This was accomplished by the passage of the Vice-Admiralty Courts Act, 1863, and the amendment thereto of 1867. The extended jurisdiction was practically in the same direction, and over the same classes of subjects, as in the High Court of Admiralty. There were, however, some important exceptions, and these very seriously impaired the usefulness and efficiency of the Vice-Admiralty Courts. They had no power to deal with charter parties or bills of lading; they had no authority to decide questions of ownership or title to vessels; they were powerless to settle disputes between co-owners and adjust outstanding accounts; they could not sell the vessel or any part of it and distribute the proceeds as the circumstances and justice of the case might warrant. These were important omissions, and for years seriously lessened the value of these Courts. Their efficiency was still further impaired by an antiquated, cumbrous mode of procedure. The proceedings were by act on petition or by plea and proof. The former involved a statement of facts on the part of the promovent; this statement was then delivered to the adverse proctor for his reply, who returned it to promovent's proctor for his rejoinder. The pleadings on either side were supported by affidavits, and when the act was concluded it was signed by both proctors, brought into Court with the affidavits and exhibits, and was then heard by the judge. This method of proceeding was considered a deviation from the regular and strict practice of the Court, and was only adopted by consent of both parties. The action by plea and proof was the more regular and customary mode of proceeding. The plaintiff filed his libel and produced his witnesses to prove its contents before the defendant was called upon to answer. All witnesses were examined in private before the registrar or an examiner appointed by the judge. The proctors were not allowed to be present at the examination of witnesses. This procedure was borrowed from the civil law system. It was cumbrous, inconvenient and uncertain, and yet it obtained in Vice-Admiralty Courts till the rules of 1884 came into operation. These rules were founded upon the English rules then in force, and they effected a very great

change for the better in procedure. The rules of 1884 have been practically continued by the new rules of 1893.

By the terms of the Supreme Court of Judicature Act, 1873, the High Court of Admiralty of England became united and consolidated with the other Courts named in the Act as one Supreme Court of Judicature in England. The Supreme Court of Judicature consists of two permanent divisions, the High Court of Justice having and exercising original jurisdiction, and the Court of Appeal having and exercising appellate jurisdiction. The High Court of Justice is constituted a Superior Court of Record, and in this High Court of Justice is vested generally all the jurisdiction which, at the commencement of the Act, was vested in or capable of being exercised by the Court of Chancery, Queen's Bench, Common Pleas, Exchequer, Admiralty, Probate, Divorce, and some local Courts. All the jurisdictions formerly vested in these different Courts are now transferred to and vested in the said High Court of Justice. The English Admiralty has therefore become a Division of the High Court of Justice. Litigation is disposed of by being assigned to its appropriate Division, but it is provided by the amending Act of 1875 that, subject to the rules of Court, a person commencing any cause or matter shall not assign the same to the Probate, Divorce, and Admiralty Division, unless he would have been entitled to commence the same in the Court of Probate, or in the Court for Divorce or Matrimonial Causes, or in the High Court of Admiralty, if this Act had not passed. It is also provided by the Act of 1875 that the Judges of the Admiralty Division in rank, salary and pension stand in the same position as puisne judges of the Courts of Common Law. The Supreme Court Rules of 1883 and amendments at present govern the procedure and practice of the Admiralty Division. By Order 72, rule 2, it is provided that "when no other provision is made by the Acts or these rules, the present procedure and practice remain in force." This, in effect, means that the Admiralty Court Rules of 1859 prevail in cases not provided for by the rules of 1883.

In Canada there was no enlargement of jurisdiction in the Vice-Admiralty Courts subsequent to the Act of 1863 and the amendment of 1867 until 1891. For years, however, it had been felt that legislation enlarging the jurisdiction was necessary. Canadian maritime commerce demanded that a jurisdiction should be given, as large and comprehensive as that possessed by the High Court in England. The rules of 1884 abolished the antiquated civil law procedure in force till then, but they could not add to the jurisdic-

tion, although in form they proceeded as if the Vice-Admiralty jurisdiction were as ample as that of the High Court. The Imperial Parliament, recognizing the necessity for change, passed the Colonial Courts of Admiralty Act, 1890, by one section of which it is declared that "the jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations." By the Act the legislature of any British possession is authorized to constitute any Court of unlimited jurisdiction within its limits a Colonial Court of Admiralty. The Parliament of Canada, acting under such authorization, passed "The Admiralty Act, 1891," and thereby declared the Exchequer Court of Canada a Colonial Court of Admiralty. The rules of 1893 have been framed under the authority of the two last named Acts. These rules follow the rules of 1884, but have, in consequence of the altered conditions, additional sections relating to appeals. It is important to note that by rule 228 "In all cases not provided for by these rules the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed." In England, as we have already seen, where the rules of 1883 are silent, recourse must be had to the Admiralty Rules of 1859. Canadian practice and procedure, in certain cases, may therefore be governed by the rules of 1859.

It has already been pointed out that the maritime Courts of the continent of Europe anciently had jurisdiction of all controversies respecting freight; of damages to goods shipped; of the wages of mariners; of the partition of ships by public sale; of jettison; of commissions or bailments to masters and mariners; of debts contracted by the master for the use and necessities of the ship; of agreements made by the master with merchants, or by merchants with the master; of goods found on the high seas or on the shore; of the armament or equipment of ships, galleys, or other vessels, and generally of all other contracts declared in the customs of the sea. These claims are put forward in the *Consolato del mare*, and in the agreements of 1575 and 1632. In England these claims to jurisdiction were cut down to narrow limits by the Common Law Courts, but the present jurisdiction is as wide as was ever claimed, and in some respects wider.

There may be one or two exceptions to this statement. In the old commissions to the judges in England jurisdiction was given to entertain a suit on a bill of exchange or a policy of insurance. The Scotch Admiralty had, and apparently still has, jurisdiction in cases of bills of exchange. The French Code of 1681 had jurisdiction of policies of insurance and all contracts relating to marine commerce, and Story, J., in *DeLovio v. Boit*, held that in the United States the Admiralty had jurisdiction of a policy of insurance. Lord Esher, however, held in a very recent case that, as respects policies of insurance, "it is undoubted that no such jurisdiction has ever been attempted in England" (1).

The enlargement of jurisdiction was granted by the legislature to remedy a grievance, and in consequence the Privy Council holds that such legislation ought to be construed liberally so as to afford as great relief as the fair meaning of the language will permit (2). We have ample evidence of this purpose on the part of the judges in the judicial decisions. It is only necessary to call the reader's attention to the clauses of the statutes of 1840 and of 1861 in confirmation of this statement. By 3 & 4 Vict. c. 65, s. 6, it is enacted that the Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of damage received by any ship or sea-going vessel whether such ship is within the body of a county or upon the high seas at the time when the damage was received, and by 24 Vict. c. 10, sec. 7, the High Court of Admiralty is given jurisdiction over any claim for damage done by any ship.

Reference to the decided cases, beginning with *The Robert Pow* (3), decided by Dr. Lushington in 1863, and ending with the *Mersey Docks and Harbor Board v. Turner* (4), will show the transition of judicial opinion from a strict and narrow construction to a broad and liberal interpretation of these remedial statutes. It was held in *The Robert Pow* that the Court could not entertain a claim for damage against a tug occasioned to the tow by the negligence of the tug, if the damage arose, not by collision, but by the vessel towed taking ground. It is not necessary in this place (5) to refer at length to the decided cases. But in collision cases the Court, by reason of wise and liberal interpretation, has now jurisdiction to entertain a

(1) *Reg. v. Judge City of London*
Court (1892), 1 Q. B. 293.

(2) *The Pieve Superiore*, L. R. 5 P.
C. 484.

(3) Br. & Lush. 99.

(4) (1893) A. C. 468, s. c. 9 Times,
L. R. 624.

(5) See note to *The Enrique*, post,
p. 161, for citation of cases.

suit for damage done by collision between two vessels ; for damage done by a ship to things other than a ship, as, for instance, an injury to a breakwater (1), a telegraph cable (2), a railway carriage (3) ; for damage done to a ship by a barge, a pier, dock wall (4), or other object, through the negligence of those having it in charge ; and for damage done to a person. And in the case of *The Industrie* (5) the jurisdiction was sustained, where the plaintiff's vessel, in taking the necessary steps to avoid a collision, took the ground and drove against the town wall of Hartlepool, sustaining damage, and causing damage to the town wall. These illustrations, which might be largely multiplied, will show the tendency of the Courts in interpreting and giving effect to the statutes enlarging the Admiralty jurisdiction.

It has been pointed out above that the Canadian Courts of Admiralty are required by statute to have the same regard to international law and the comity of nations as the High Court in England.

A question of much importance and some intricacy, known as the law of the Flag, has of late years received considerable judicial attention. Much discussion has from time to time taken place as to whether there is a general maritime law, binding upon the maritime Courts of all nations. Judge Duer (6) says : " If the law merchant is, indeed, the law of the land, and if it consist in the general custom of merchants—that is, in the rules by which merchants not in one port or country, but throughout the great family of the nations, which commerce has linked together, are usually governed—when satisfactory evidence that a particular rule is thus sanctioned is adduced, it ought surely to control the judgment of the Court." Another writer (7), quoted by Duer, says : " The ordinances of other countries are not, it is true, in force in England, but they are of authority, at least, as expressing the usage of other countries, upon a contract which is presumed to be governed by general rules that are understood to constitute a branch of public law." Commenting upon this statement, Duer (8) says : " It is manifest that no real difference can exist in respect to their authority between foreign ordinances and foreign judgments, and it would be unreasonable to suppose that Mr. Marshall meant to be otherwise understood. It would be absurd to admit the authority of a

(1) *The Excelsior*, L. R. 2 A. & E. 268.

(2) *The Clara Killam*, L. R. 3 A. & E. 161.

(3) *The Teddington*, *post*, p. 45.

(4) *Mersey Docks and Harbor Board v. Turner* (1893), A. C. 468.

(5) L. R. 3 A. & E. 303.

(6) 1 Mar. Ins., p. 5.

(7) 1 Marshall, p. 20.

(8) at p. 7.

law, and deny that of its judicial interpretation by the tribunals of the country in which it prevails, or to affirm that evidence of a usage is not as clearly to be deduced from the one as the other. The ordinance and the decision stand on the same ground. Both are evidence of a law: In the one case enacted, in the other declared; and in both cases, the existence of a usage in correspondence with a law, may be presumed. Neither is in force. Both are of authority. Neither claims our implicit submission. Both, when they convince the reason, oblige the conscience. *Valent ratione, non jure.*" Sir Robert Phillimore, in his learned work on International Law (1), says that the High Court of Admiralty and the Privy Council "were careful during the existence of the old law, and before the establishment of the present International Rules, never to apply to a foreign vessel the rules of navigation prescribed by statute for British vessels. In all cases of collision upon the high sea or in foreign waters, between a foreign and British vessel, or between two foreign vessels, the wrong-doer, whether he were foreign or English subject, was ascertained by a reference to the old rule of the sea, founded on the principles of general maritime law, and not to the rule prescribed by the English statute. Cases of collision, like cases of salvage, are considered as belonging to the *jus gentium*." This distinguished author, sitting as Judge of the High Court of Admiralty in *The Patria* (2), says: "I have been much pressed by counsel for the plaintiffs to pronounce that the decision of *Lloyd v. Guibert* is not binding on the Admiralty Court, and also that the judgment errs in ascribing to the Admiralty Court the doctrine that the general maritime law is not an universal maritime law, binding upon all nations in time of peace, but a law which is to be derived from the practice and decisions of English tribunals. If it were necessary to decide the latter point (with all respect for the high authority of the tribunal which delivered the judgment), I should have hesitated a long while before I assented to the position that there was not a general maritime law, which, according to the comity of nations, was administered in the English as well as in the foreign Courts of Admiralty. I should have remembered and endeavored to apply the law upon which Lord Stowell, in *The Gratitude* (3), founds the authority of the master when acting as necessary agent for the owner of the cargo, and the language of Lord Tenterden, in *Simonds v. White* (4), as to the doctrine of average. 'The principle of average,' says that high authority, 'is of very

(1) 4 Phil. Inter. Law, 2nd ed. 625.

(3) 3 C. Rob. 240.

(2) L. R. 3 A. & E., p. 461.

(4) 2 B. & C., p. 811.

ancient date, and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much upon the terms of any particular instrument as upon a general rule of maritime law.' I should have referred to the judgment of Story (1) as to the ancient laws, customs, and usages of the sea, and have considered whether there was not a general maritime law founded upon them, and the recognized exposition of them wholly distinct from the common law of England, as the law by which, in cases of collision, the Admiralty Court finds both parties to blame, is distinct from that of the Common Law Court, which, upon its own principles, refuses to allow any such verdict to be given."

While it may not be successfully contended that there exists any general maritime law of universal application and binding upon the Courts of all nations, yet the Courts of all countries will follow those old codes in so far as founded upon justice and equity, and when not repugnant to the usage or law of the particular country. This doctrine has been clearly and fully laid down by the Supreme Court of the United States (2). The Court says "that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such, or, like the case of the civil law which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein and with such modifications as are deemed expedient." And further in the same case: "Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens that from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law, which is thus received by these nations in common, comes to be the common maritime law of the world."

In *Lloyd v. Guibert* (3), in which it was contended that the contract of affreightment should be determined by the rules of the general maritime law, Willes, J., delivering the judgment of the

(1) *DeLovio v. Boit*, 2 Gall. 398.

(3) L. R. 1 Q. B. 115.

(2) *The Lottawana*, 21 Wall. p. 572.

Court, said: "We can understand this term in the sense of the general maritime law as administered in the English Courts, that being in truth nothing more than English law, though dealt out in somewhat different measures in the Common Law and Chancery Courts, and in the peculiar jurisdiction of the Admiralty; but as to any other general maritime law by which we ought to adjudicate upon the rights of a subject of a country which, by the hypothesis, does not recognize its alleged rule. We were not informed what might be its authority, its limits, or its sanction." A writer (1) of acknowledged authority, commenting on this judgment, says: "Undoubtedly, however, there was a time when the *lex mercatoria*, though the law of England, was also the law of other nations, and was the law of England because it was the law of other nations." We have also the authority of Lord Mansfield, "That the maritime law is not the law of any particular country." Admitting, however, as the authorities now declare, that each nation is governed by its own system of maritime law, difficulties are very apt to arise in contracts of affreightment, bottomry, and other transactions arising out of modern commerce, depending upon the nationality of the carrying ship, the law of the place of performance, and the law of the place where the contract was made.

It may be considered now as settled law that in the absence of any express indication of intention as between the parties to a contract of affreightment, there is a strong presumption in favor of the law of the ship's flag. This is the doctrine laid down in *Lloyd v. Guibert*. In this case the plaintiff, a British subject, at a Danish West India port, chartered a French ship to carry a cargo from Hayti to Havre, London or Liverpool. The vessel sailed with the cargo for Liverpool, but on the voyage sustained damage, and had to put into Fayal, a Portugese port, for repairs. There the master properly put a bottomry bond on ship, freight and cargo. After the arrival of the ship at Liverpool the holder of the bond proceeded against the ship, freight and cargo in the Admiralty. The ship and freight were insufficient to satisfy the bond, and the deficiency fell on the plaintiff, as owner of the cargo, and he sought indemnity against the French shipowners. The defendants, the shipowners, gave up ship and freight to the shipper, and by the law of France such abandonment relieved the shipowners from further liability. Such abandonment would not, however, have absolved from liability a British shipowner. The Court held that the parties in making

(1) Smith's Mer. Law (10 ed.), Introduction lxxv.

the charter must have intended to be governed by the law of the flag, and decided in favor of the French shipowners. Another principle properly deduced from the law of the flag is that whoever puts his goods on board a foreign ship to be carried authorizes the master to deal with them according to the law of the ship's flag, unless that authority is limited by express stipulation between the parties at the time of entering into the contract. This was the rule laid down in *The Gaetano e Maria* (1). A bottomry bond was given by the master of an Italian vessel covering the vessel and cargo. A part of the cargo belonged to a British subject. The bond was valid by Italian law, but invalid by English law, as the necessary formalities had been omitted. The Court sustained the validity of the bond on the ground that the case was governed by the law of the flag (2). Mr. Machlachlan (3), the well-known author of the work on Merchant Shipping, claims that he was the first to communicate to the profession the principles and designation of the law of the Flag. Other phases of the development of Admiralty jurisdiction under existing legislation might be indicated were it necessary to do so.

It is appropriate to conclude with two quotations: one from an eminent jurist, upholding the efficacy of the Admiralty jurisdiction; the other from a distinguished publicist, pleading for a system of maritime law of universal application among civilized nations. Taney, C. J., says: "I can therefore see no ground for jealousy or enmity to the Admiralty jurisdiction. It has in it no one quality inconsistent with or unfavorable to free institutions. The simplicity and celerity of its proceedings make a jurisdiction of that kind a necessity in every just and enlightened commercial nation." And Sir Travers Twiss claims that "There ought to be in every civilized country Courts of Maritime Audience to settle all maritime disputes according to a common law of the sea. It is idle for nations to agree to supplement the ancient customs of the sea by written

(1) 7 P. D. 137.

(2) The reader on this point may, with advantage, consult the following authorities: *Peninsular and Oriental, etc. Co. v. Shand* (1865), 3 Moo. P. C. 272; *The Karnak* (1869), L. R. 2 P. C. 505; *The Express* (1872), L. R. 3 A. & E. 597; *Chartered Mercantile Bank, etc. v. Netherlands* (1883), 10 Q. B. D. 521; *In re Suse* (1887), 18 Q. B. D. p. 666; *In re Missouri S. S. Co.* (1889), 42 Ch. D. p. 336; *Pope v. Nickerson*, 3 Story 465; *The Selah*, 4 Sawyer 40, *The Scotland*, 105 U. S. 24; *The Julia Blake*, 107 U. S. 418; *Ellis v. McHenry*, L. R. 6 C. P. 238; *The M. Mozam*, 1 P. D. 51.

(3) Law of Shipping, Preface, 4 ed., 1892.

INTRODUCTION.

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rules adapted to the altered circumstances of sea navigation, unless they agree in like manner to adopt a common system of judicature by which these rules may be enforced, and the disregard of them visited with penalties" (1).

(1) *The Jurisdiction of the Silver Oar of the Admiralty*, by Twiss, 46 *Nautical Mag.* p. 572, A. D. 1877.

REPORTS OF CASES
IN THE
VICE-ADMIRALTY COURT
OF
NEW BRUNSWICK.

THE SOULANGES—PEATMAN;
THE NEPTUNE—HAWKINS.

1879
Aug. 11.

*Collision—Neglect of Proper Precautions—Observance of Sailing Rules—
Liability—Lights.*

The passenger steamer S., sailing up the river St. John, met the steam-tug N. coming down, near Akerley's Point, where the river is about half a mile wide. The S. was near the western shore, which was on her port side going up; the N. about one hundred and fifty yards from the same side of the river. The S., by keeping her course when she first sighted the N., might have avoided the collision, but instead ported her helm, which gave her a diagonal course to starboard towards the east side, and as a result struck the N. on the starboard quarter, and sank her.

*Held:—*That the S. was to blame, and liable for the damages sustained; also held that when two vessels are meeting end on, or nearly so, the rule to port helm may be departed from, where there are reasonable grounds for believing such course is necessary for safety, and consequently the N. was not to blame, immediately before the collision, for putting her helm to starboard.

A vessel may take a course opposed to that indicated by the rule when there is reasonable ground for believing such proceeding necessary for her safety or more secure navigation.

These two cases were tried on the same evidence, and were argued together. The facts and evidence fully appear from the judgment of the learned judge.

E. L. Wetmore, for the promovents against the Neptune, contended that the Neptune was wrong (1) because she had

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not the proper lights exposed according to law; (2) the watch on board was evidently careless; (3) when she sighted the Soulanges it was her duty to put her helm to port and pass the Soulanges on the port side. He cited *The Canadian Act of 1868* (1); *Abbott on Shipping* (2); *The Friends* (3); *The Jesmond* (4); *The Tirzah* (5); *The Elphinstone* (6).

C. W. Weldon, Q. C., for promovents against the Soulanges, contended the Neptune had proper lights, a proper watch, and was properly navigated. Before the captain of the Soulanges took any precautions to ascertain the positions of the vessels he ported his helm; if he had not done so the vessels would have gone clear. *Fisher's Dig.* (7); *The Henry* (8); *The Black Diamond* (9); *The Velocity* (10); *The Ranger* (11); *The Princess Alice* (12).

Wetmore replied.

WATTERS, J. These were cross libels for damages by collision between the steamer Soulanges and the steam-tug Neptune on the river Saint John. The collision took place on the 9th of November, 1877, at night, whereby the Neptune was so much damaged that she shortly afterwards sunk. The two suits were heard together on the same evidence and arguments.

The first material question to be determined in the evidence is, what were the respective positions of these vessels when they first sighted each other? On this point the sworn statements of the witnesses are conflicting. Captain Peatman, of the Soulanges, says: "We were in the middle of the river, or a little towards the eastern bank, when I saw a bright white light on our port bow, about Akerley's Point, or a little above it. It appeared to me to be close in to the shore. I saw no other light at that time. * * * I said to the man at the wheel, 'I think it is a schooner's

(1) pp. 163, 164, 31 Vic. c. 58.

(2) p. 605.

(3) 1 W. Rob. 485.

(4) L. R. 4 P. C. 1.

(5) 4 P. D. 33.

(6) *Montreal Gazette*, Dec. 1877,
now reported in Cook, 132.

(7) p. 8109.

(8) 12 W. R. 1014.

(9) 9 L. T. N. S. 396.

(10) L. R. 3 P. C. 44.

(11) L. R. 4 P. C. 519.

(12) L. R. 2 P. C. 245.

light.' I said 'Port your wheel; we will keep our own shore, and give her a good berth.' He ported a few spokes so as to give her a cant to the eastern shore, and the light still appeared to be getting nearer to us." 1879
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Joseph Belyea, a passenger, who was steering the Soulanges at the time of the collision, says: "After passing Buzzy's Point, formerly Scovil's, we came about opposite Beddy's Hole, or a little above it. We were, as I believe, in the middle of the river when the captain called my attention to a white light apparently above Akerley's Point. I only saw a white light. I saw no other light at that time in that direction. The captain said, 'You may port, and give her a good berth.' I took the light at that time to be about a quarter of a mile distant. * * * When we were above Beddy's Hole we were steering about an east course for the mouth of the Jemseg. We would show the Soulanges' port side to a steamer coming down the river. We then kept the Soulanges all the time towards the east bank of the river. We kept her wheel a little to port all the time. At the time of the collision we were a little more than half way across the river towards the eastern bank."

Albert Crawford, the owner of the Soulanges at that time, says: "I was in the cabin, and felt a shock. I ran out aft, and went up on the top deck forward of the paddle box. I saw a steamer alongside on the starboard side. I then looked to see where we were. The night was dark, but the shores could be plainly seen. It was a very fair night for sailing on the river; it was not misty. I could see the light on Buzzy Point on our starboard bow. I thought we were about one-third of the breadth of the river from the east side, and about one-fourth of a mile, as I supposed, from the mouth of the Jemseg below, and a short distance below Akerley's Point on the opposite side."

Thomas L. Simmons, a passenger, and Estabrooks, a fireman, on board the Soulanges, say that at the time of the collision the Soulanges was about one-third of the width of the river from the eastern bank.

In conflict with this evidence, Henry Hawkins, the captain, and William A. Finlay, the pilot, of the Neptune, say that

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SOULANGES. they kept their course on the starboard side of the river;
NEPTUNE. that on turning round Akerley's Point they saw a green
light about three points on their starboard bow, and a white
light, apparently on a pole in the stern of the vessel carrying
the light; that from the position of these two lights the
vessel must have been steering for Akerley's Point; that
the captain blew his whistle the moment these lights became
visible, and blew a second time, but received no answer;
that they did not alter their course, but eased the engine;
that the vessel seemed to put her helm to port, as she im-
mediately, in a minute or a minute and a half after, run
into the Neptune on the starboard quarter; that had she
kept on her course, which she was running when first
sighted, she must have passed the Neptune on the starboard
side, probably at a distance of two hundred feet; that at
the time of the collision the Neptune had got round Aker-
ley's Point, and had just passed a wharf there from which
hay is loaded.

In addition to the statements of these witnesses, we have
the material fact of the finding of the sunken steamer Nep-
tune to assist us in ascertaining the true positions of the
vessels at the time of the collision.

The river at the place where the steamers met is about
half a mile, or eight hundred and eighty yards, wide. The
Soulanges assert that she was then about one-third of the
width of the river, or two hundred and ninety-five yards,
from the eastern shore, towards which she was steering.

The helmsman of the Soulanges says: "When the Nep-
tune got loose from us she rubbed along our starboard side
towards the stern, went round our port quarter about two
hundred feet, and sank." The passenger, Thos. L. Simmon,
says: "I saw the Neptune drifting down on our starboard
side, and going astern of us; she seemed to go fifty or one
hundred yards, and then sunk." If these statements were
correct the Neptune would have sunk about three hundred
and sixty yards from the eastern shore, whereas she was
found about seven hundred and thirty yards from the east-
ern shore, and about one hundred and fifty yards from the
west bank of the river, or about three hundred and seventy

yards to the west of the spot indicated by these witnesses. The pilot of the Neptune says: "The vessels stuck fast and swung round together. The Neptune immediately sank; she was under water when I put my foot on the rail to get on board the other vessel; she went down about where she was struck. I don't think she drifted half her length from where the collision occurred."

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Captain Hawkins says: "The vessels hung together for about a minute or a minute and a half, until the water ran into the Neptune, and she settled down by the stern; she went down almost at once at the place where the collision occurred."

James Kennedy, who was employed to raise the Neptune, says "he found the Neptune about three hundred feet from the shore of the western bank of the river, a little below Akerley's Point, and a little below the range of the wharf."

P. Lynch, one of the owners of the Neptune who went up to see about raising her, says "she was lying about one hundred and fifty yards from the western bank of the river, about abreast of the wharf, a little below Akerley's Point."

The finding of the Neptune so close to the western bank of the river is, to my mind, strongly corroborative of the testimony of Captain Hawkins and his witnesses—that the Neptune was struck on her starboard quarter by a steamer from the west side crossing her path, and convinces me that those on board of the Soulanges were so taken by surprise at the suddenness of the collision that they entirely mistook the position and course of the Neptune from the moment they first sighted her. I therefore regard it as proved, by a preponderance of evidence, that when the steamers first came in sight of each other the Neptune was near the middle of the river, on the starboard side, having rounded Akerley's Point, which is on the east or right bank, and that the Soulanges was inshore nearer the western bank, and apparently heading for Akerley's Point. The Neptune was steering down the river in her proper position, the Soulanges ascending on the west side showing a green light. Had the Soulanges kept her course straight up the river, at least until she had passed the Neptune, or had she stopped

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NEPTUNE. until the Neptune had passed her, the collision would have been avoided; but in place of so doing the Soulanges suddenly altered her course, steering across the river diagonally towards the Neptune, which was a rash and hazardous attempt, and which resulted, in my opinion, in the damage to the Neptune. The Soulanges being close inshore on the western side of the river, and intending to cross to the opposite side, was bound to take all proper precautions, and to move with great circumspection to avoid encountering other vessels which might be then rounding Akerley's Point.

It is charged against the Neptune that she did not show proper lights, and such default contributed to the collision. On this point, the captain of the Soulanges says he saw only a white light, and he therefore concluded that it was a light of a vessel at anchor. Now, whilst it may be true that a white light alone usually represents a vessel at anchor, the captain had no right to conclude that such was always the case. It was his duty to have watched the light carefully to ascertain from its bearings whether the vessel was in motion or at anchor, and if this could have been done, and the omission contributed to the collision, the Soulanges would be at fault. Captain Peatman says: "I saw a bright white light on our port bow about Akerley's Point, or a little above it. It appeared to me to be close into the shore. I saw no other light at that time; the lights of an approaching vessel could be easily seen. When I first saw the light it appeared at a distance of nearly a quarter of a mile. I said to the man at the wheel, 'There must have been a heavy wind on the river to-day, there are so many vessels at anchor; there is another anchor light, meaning the light of a vessel at anchor.' I said, 'Port your wheel; we will keep our own shore, and give her a good berth.' * * * Within half a minute I heard an alarm whistle from a steamer, which, I think, was then one hundred and fifty yards from us." The Soulanges had, therefore, run in a direction across the river for some distance without discovering that the light was that of a vessel in motion, and was within one hundred and fifty yards of the Neptune

before they discovered that the light was that of a steamer approaching them. Why was not the discovery made sooner? The night was not dark. Belyea, the man at the wheel, says: "It had been dark, but brightened up again. It was not thick weather, and they could see both sides of the river plainly." Although Captain Peatman and the steersman (Belyea) say they only saw a white light on the approaching vessel, I have no doubt, on the whole evidence, that the steamer Neptune had at that time her red, green and white lights showing efficiently in their proper positions. Captain Hawkins says: "Whilst we were lying at Oromocto (which place the Neptune left about ten o'clock on that evening) I took all the lights down, trimmed them, and put them up again. There was a red light on the port bow, a green light on the starboard bow, and a white light at the mast-head, about fifteen feet from the water. These lights were in the usual positions, and were kept in position until the collision occurred." The pilot (Finlay) says: "We had a red light on the port bow and a green on the starboard bow, and a white light on a pole fifteen feet from the deck." James Fox, the engineer of the Neptune, says: "We carried three lights—green on the starboard bow and red on the larboard bow, and a white mast-head light. * * * I looked at the lights about three minutes or so before the collision occurred. I went forward to the wheel-house, and the captain and pilot both asked me if the lights were all right. I said they were burning tip-top, and, in fact, they were burning well." In addition to this, there is the evidence of Frederick Apt, a passenger that night on board a schooner which was lying at anchor above the mouth of the Jemseg. He says: "A steam vessel passed us on the way down river—one of those little screw boats. I afterwards heard it was the Neptune. When the steam-tug passed us it was early in the night. I can't say at what hour. She had three lights up—one was red, another green, and another white. I cannot say in what part of the steamer they were placed." Captain Peatman states that as the Neptune was passing the Soulanges at the time of the collision he saw her green light, which he

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SOULANGES. Neptune it is alleged that those on board the Soulanges saw
NEPTUNE. the Neptune's green light when the vessels were within two hundred feet of each other. It is evident, to my mind, that the Neptune had her lights properly exposed, and that had a strict and careful watch been kept on board the Soulanges these lights could have been seen before there was any danger of collision.

It is also contended that the Neptune did not observe the rule prescribed in the Dominion Act, which directs that when two vessels under steam are meeting "end on," or nearly "end on," so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other. This rule is by no means inflexible. Like all other general rules, it must yield to the necessity and reason of particular cases. A vessel may take a course opposed to that indicated by the rule, when there is reasonable ground for believing such proceeding necessary for her safety or more secure navigation. *The Switzerland* (1). This rule is applicable only when the vessels, by continuing their respective courses, are likely to come into collision, and when, by porting their helms, the collision may be avoided. But the rule is not applicable where either vessel, by unskilful management, is so near the shore that by porting her helm there would be danger of collision. In such case the vessel in her right course is justified, in spite of that rule, in putting her helm to starboard. *General Steam Navigation Co. v Tonkin* (2).

In this case the Neptune was in her proper position. She had a right to continue her course, and the Soulanges, by crossing the course of the Neptune, did so at her peril. Had the Neptune ported her helm when she first sighted the Soulanges, it is possible that the vessels might have gone clear of each other; but it appears to me that there was sufficient room for them to pass clear without her doing so. But what reason had the Neptune to presume that the Soulanges would so suddenly have changed her course towards the eastward? When first sighted at the short

(1) 2 W. Rob. 485.

(2) 4 Moo. P. C. 314.

distance of a quarter of a mile from each other, the Soulanges appeared to be running straight up the river, steering for Akerley's Point, and had she continued that course the changing of the Neptune's course, by porting her helm, would, in all probability, have brought her into contact with the Soulanges, whilst, by pursuing her direct course, she had no reason to apprehend that any danger or difficulty would arise. It has been held in cases of collision that it is no defence to a vessel clearly in the wrong that the other vessel might, by departing from the ordinary rules of navigation, have avoided the collision; but the whole damage will fall upon the vessel which did not adopt the measures proper for her in the particular circumstance. *The Test* (1).

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It has been also argued that the master of the Neptune was at fault in starboarding his helm at the moment of the collision. I do not, however, consider that any imputation attached to him on that account, as the collision was at that moment inevitable, and his adopting the measure he did was to diminish, as far as possible, the impending evil.

My opinion on the whole case is that the collision was caused by the default and mismanagement of the Soulanges, and this decree must be against her.

The Court therefore dismisses the action of the owners of the Soulanges against the Neptune, with costs, and maintains that of the owners of the Neptune against the Soulanges, also with costs.

On the question of damages, I find the aggregate of the costs and expenses of raising the Neptune, bringing her to Saint John, and making the necessary repairs proved by Patrick Lynch, one of the owners of the Neptune, to be \$1,784.67, with interest from date of deposition, August 19, 1878, \$107 in all, which I assess at that amount against the Respondents, making in the whole \$1,891.67.

(1) 5 Notes of Cases, 276 s. c. 11 Jur. 998.

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THE GRACE—NORTHROP.

*Collision—Sailing Rules—Departure from—Liability—Inevitable Accident—
 What is.*

Two vessels, the R. and the G., were sailing up the river from St. John to Fredericton. At Perley's Reach, so called, near Fredericton, where the river runs about north-west and south-east, and is about three hundred yards wide, the R. being on the starboard side of the river, and on her starboard tack, the G. on the port side of the river, and on her port tack, the vessels were passing each other port side to port side. When the G. was nearly abreast the R. she suddenly rounded to, and struck the R. on the port side forward of the mainchains, when the R. immediately sank.
*Held:—*That it was not a case of inevitable accident; that the R. being on the starboard tack, had the right of way; that the G. was to blame for the collision, and was liable for damages.

The facts of this case are fully stated in the judgment of the Court.

C. A. Palmer for promovents.

S. R. Thomson, Q. C., for respondents.

WATERS, J. This was a cause of damage by collision promoted by the owners of the schooner *Ranger* against the woodboat *Grace* for having run her down on the 10th May, 1879. The two vessels were on that day proceeding on their way up the river Saint John to Fredericton. The libel alleges that the *Ranger* sailed from Saint John on the 9th May with a cargo of cornmeal, coal, and general merchandise, bound for Fredericton; that she proceeded on her voyage up the river Saint John, when she arrived near Middle Island, or Perley's Reach, being then under full sail, and on the starboard side of the middle of the river, the course of the river at that place being about north-west and south-east, the *Ranger* being on her starboard tack and steering a course of west by north when they sighted the *Grace* on her port tack and sailing up the river, which was there about three hundred yards wide; that she sailed on the port side of the *Ranger*, so that the two vessels were

passing each other on each other's port side a sufficient distance to clear each other and do no damage; that when the Grace was nearly abreast of the Ranger, by some unaccountable bad management or unskilful seamanship, the Grace suddenly rounded to and ran directly into the Ranger and struck her a little forward of the main-chains, and that the Ranger immediately sank.

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The responsive allegation, brought in on behalf of the Grace, alleged that on the 10th May the wind was blowing hard from the west, varying to west-south-west; that in consequence the Grace, with other vessels, was obliged to lie at anchor on the port side of the river, near Taylortown, and whilst she lay there the Ranger sailed up the river; that the Grace weighed anchor and overhauled and passed the Ranger at Middle Island before entering Perley's Reach; that the Ranger was on the starboard tack and steering about south by west, whilst the Grace was on the port tack steering north by east; that after the Grace had left the port side of the river, and the Ranger had left the starboard side, and when they were about three or four lengths apart, the wind suddenly veered round, and a heavy squall from the south-south-west struck the Grace aft, and without the fault of any one caused her to luff up and changed her course—that is to say, headed her up the river; the master of the Grace was at the time at the tiller with William Belyea, a hand on board; they (both of them) pushed the tiller hard a port, in order to get the Grace on her course again; that the captain then held the tiller in that direction and immediately sent Belyea to let the main-sheet go; that Belyea did run, and as quickly as possible was in the act of letting go the main-sheet, but before he could do so the Ranger lapped on the Grace and took the wind out of her fore-sail, leaving the whole pressure of the wind on the main-sail, turning her head still more up river in the direction of the Ranger, and jerking the tiller out of the master's hands, whereby the Grace at once came into collision with the Ranger, and whereby the Ranger sank, but such collision was the inevitable result of the manner in which the Ranger was managed, and not owing to any fault of the

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 THE GRACE. Grace; that the Ranger did not make any attempt to avoid the collision, but notwithstanding that they saw the said squall strike the Grace, and caused her to head up river, yet the Ranger kept on her course, whereby and thus the collision was caused by the bad management and unskilful navigation of the Ranger, and not by that of the Grace.

The defence, therefore, offered is in effect that the collision was either the result of inevitable accident or the fault of those on board of the Ranger.

In *Roscoe's Admiralty Practice* (1) it is said: "When damage is caused by circumstances which the party charged could not have prevented by the exercise of ordinary care, caution, and nautical skill, the result of such events is inevitable accident." Dr. Lushington, in the case of *The Europa* (2), says: "Inevitable accident must be considered as a relative term, and must be construed not absolutely, but reasonably, with regard to the circumstances of each particular case. In the strict sense of the term there are very few cases of collision that can be said to be inevitable, for it is almost always possible, the bare possibility considered, to avoid such an occurrence."

How was this collision an inevitable accident? (Reads evidence on this point.)

Captain Peck, master of the *Angola*, a witness produced by the promovents, who was at the time on board of his own vessel beating up the river, and about one-fourth of a mile away, describes the collision. He says he was rather above the Grace and Ranger, and was on the starboard tack a little ahead of the Ranger; that the wind was blowing a strong breeze and rather squally. The Ranger was on her starboard tack, and the Grace coming on her port tack towards the Ranger; that she seemed to be going head first right into the Ranger; she went stem on, and struck the Ranger between the two masts. He thought she struck her, because the Grace did not give way. He says it was done very quick. The wind had been blowing from about southwest; it had not changed for nearly three hours. He says:

(1) p. 29.

(2) 2 Moo. P. C. N. S. 1 s. c.; 32 L. J. Ad. 188; Br. & Lush. 89.

"I did not notice any squall on that day; it was blowing fresh that afternoon. I do not think the collision happened from any squall, but from want of presence of mind of the parties in charge of the Grace. There was no squall which required my attention to my vessel more than usual."

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Frederick Dunham, another witness of the promovents, and the pilot of the Ranger, says: "The wind was blowing pretty fresh from the south-west nearly ahead; the weather was clear and we were beating up river. The Ranger was on the starboard tack, the mate at the wheel, and I was in the bows on deck. The Grace was on the port tack. If she had kept the course she was steering she would have passed under our stern. We kept on our course, expecting she would also keep on hers. Instead of doing so, when about fifty yards off, she brought up into the wind and run into the Ranger." He says: "I think the collision was occasioned by the neglect and oversight of those in charge of the Grace, and that they took no means to prevent it. I did not observe any sudden squall."

Robert Melvin, another witness for the promovents, says: "When we tacked on the northern side of the river, the Grace tacked on the southern side; she was a little below us when she tacked; when she was abreast of our main rigging, between two hundred and three hundred feet distant, she rounded to into the wind, and before we could change our course she struck us forward of the main rigging. If the Grace had kept on her course which she was steering before she luffed up into the wind, she would have gone clear of us to leeward. I was steering the Ranger at the time, and I was keeping my eye on the Grace. There was no sudden squall of wind that I know of; the wind had been blowing about the same for an hour and a half or two hours. The Ranger was steering in her proper direction and had the right of way on that tack; the Grace was also steering in the right direction before she luffed up. There was no squall to strike the Grace, and none struck her. I never saw that the Grace had become unmanageable or that a squall had struck her."

The captain of the Ranger says: "It was about four

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THE GRACE. o'clock in the afternoon of the 10th May; we were beating up river on the starboard tack; we had tacked on the northern side. The Grace, about the same time, tacked on the southern side of the river. She was on the port tack and a little to leeward of us. When she got nearly abreast of our beam I considered that from the course the two vessels were taking they would go clear of each other, and that the Grace would pass under our stern, when all upon a sudden the Grace came to, head to the wind, not giving us time to alter our course; she came into collision with the Ranger. I know nothing of the reason why the Grace luffed, and which occasioned the collision, except from what I was told by the master of the Grace, and by Belyea, the man who was running the Grace with him. The master told me he thought the vessels were coming too handy; that he and Belyea were steering; that he told Belyea to slack off the main-sheet, and that when Belyea let go the tiller rope a turn came off the tiller and the Grace was coming to; that before he started the main-sheet he told Belyea to hold on to the sheet, and both of them took hold of the tiller and shoved it hard to leeward, thinking she would come round on the other tack before she struck the Ranger. Belyea also told me the same story. I do not know of any sudden squall of wind at the time of the collision; there was a strong breeze, perhaps a little stronger than it had been blowing for an hour and a half before."

Captain Northrup, of the Grace, says: "The wind began blowing more off the port shore. We were both beating up the river. We got into Perley's Reach; we were then ahead of the Ranger, the wind blowing very heavy and very baffling from south to south-west. The Ranger was on the opposite tack from us; when she stayed on the starboard side of the river we stayed on the larboard side. At that time the wind was hauling square down through Perley's Reach. I made my calculation to go under the stern of the Ranger. When we came within three or four lengths of her the wind struck more aft on the Grace. I was steering. William Belyea helped me in shoving the tiller to port, so as to make the Grace go under the Ranger's stern. The Grace still kept

luffing in spite of all that we could do. I took a turn round the tiller and told Belyea to let the main-sheet go, but before he could get it clear the fore-sail of the Grace had got shut in behind the jib and the fore-sail of the Ranger, which took the wind out of our fore-sail; the fore-sail gave a slat and jerked the tiller out of my hand, which caused the Grace to luff a little quicker, and she struck the Ranger. Even if the tiller had not jerked out of my hand the Grace would have struck the Ranger. There was no one on board the Grace at the time of the collision but Belyea and myself. The Ranger was a little to windward of the Grace. The sudden shift and squall of wind was the occasion of my running into the Ranger. Belyea leaving the tiller did not occasion its slipping. I think we were two or three lengths apart when the squall struck the Grace.”

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Belyea, the hand on board the Grace, says: “The vessels came into stays about the same time. The Ranger was about opposite to us about as far up the river as we were. When we were in stays Captain Northrup said we will go round the schooner’s stern. He was steering, and I was helping him. We had the wind a little more free than the Ranger had. The squall came off the shore more free, which made it harder to steer. It was a fine day. It was a high wind, blowing very heavy and squally off the southern shore. When we were about five lengths from the Ranger, a squall struck the Grace very heavy. The squall caused our vessel to luff into the wind. We then hauled our tiller to port as hard as we could, but still she kept luffing. The captain then told me to let the main-sheet fly. I tried to let the main-sheet go. I tried, but the tiller slipped and struck me in the ankle and knocked me to leeward away from it. I got up, but before I could get the sheet clear the vessels were together. I think we could have gone round the Ranger’s stern if the squall had not struck us. The Grace was easy to steer by the rope, but she was a bad vessel to steer when the wind was heavy; she was an ugly vessel to handle. The Ranger was on the starboard tack, sailing close to the wind. I know nothing about the right of way.”

James Travis, the master of the woodboat Amazon, saw

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Frederick Whipple, who was a passenger on board the woodboat Angola, which was lying at anchor a little above Middle Island when the collision occurred, says: "The Ranger was on the starboard tack, and would have fetched about where we were lying. I was looking at the vessels for about a quarter of an hour just before the collision. I thought there would be a collision, and I called the attention of persons on board of our vessel to the two vessels. When they got opposite to us they were on opposite tacks, the Ranger a little to windward, and the Grace heading for the other's quarter, calculating, as I thought, to go under her stern. When she got close under the Ranger's lee there was a heavy puff, or squall, struck the Grace, and the Ranger's sail took the wind out of the Grace's fore-sail, and the heavy pressure of the wind on the Grace's mainsail made her luff up into the wind. The man at the helm could not keep the Grace away, and she ran into the Ranger. I do not think the vessels were two hundred feet apart when the Grace luffed up. I thought before the squall struck the Grace that she was likely to run into the other vessel. She was shaving pretty close. She might have given the other vessel a wider berth under the stern. The day was very

squally, and a circumstance of the kind which occurred was very likely to occur in consequence of running so close. I do not think they had time to let the mainsail go after the squall struck the Grace. I think that a squall did strike her, but it was the same kind of weather that it had been all the afternoon. It was a squally day, and it would be good seamanship to have everything prepared to slack off the main-sheet. The Grace was, I think, heading for the other vessel's quarter before the squall struck her, and keeping too close for such a squally day." 1880
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Peter McIntyre, a witness called by the respondents, saw the vessels beating up the river, and says the wind was very baffling, sometimes west-south-west, sometimes west, blowing heavy, and gusts squally, so much so that he came to anchor with his vessel.

James M. Rose, mate of steamer May Queen, examined on behalf of respondents, saw the collision, says: "I was in the wheel-house. My attention was called to the two vessels, which were on opposite tacks. They were coming close together, when I saw a favorable squall strike the Grace. Two men were at the helm of the Grace. I saw one of them jump forward to where the main-sheet was fastened, I thought to let it go. Just as the Grace was going by, she rounded up and ran into the Ranger. The squall appeared to me to reach both vessels. It was blowing *quite a gale* at the time. I think the vessels were about three lengths apart when the man ran forward to let go the main-sheet. The Ranger was to windward of the Grace and running by the wind; that is, going as close to the wind as she could lay going on her starboard tack."

Captain McMulkin, of the May Queen, also saw the collision. He says: "I saw that these two must come pretty close together in passing. They were about four or five lengths apart when the mate said to me, 'They'll strike.' When they got almost opposite to each other, all at once the Grace turned short and appeared to mount right on to the Ranger, whose rail appeared to be under water. The witness also speaks of the wind blowing very strong."

This evidence on both sides, therefore, shews that these

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The law in this case imposed upon the Grace, being the vessel on the larboard or port tack, the obligation of taking the proper measures to get out of the way of the vessel on the starboard tack, and she should have been prepared to take prompt steps for that purpose.

The captain of the Grace tells us that he made his calculations to go under the stern of the Ranger, and that he steered for that purpose until he came within three or four lengths of her, when the wind struck more aft and caused the Grace to luff; that he and Belyea then shoved the helm to port so as to make the Grace go under the Ranger's stern; that finding her still luffing he ordered Belyea to let the main-sheet go, but before Belyea could get it clear she was under the lee of the Ranger, and thereby lost the control of his vessel, which luffed up quicker and struck the Ranger. This shews that the Grace was rashly kept on her course towards the Ranger, and that no precautionary measures were taken for keeping clear until she was so close to the Ranger as to have the wind taken out of her fore-sail, when

the disaster immediately occurred. It is not enough to shew that the accident could not be prevented at the moment it occurred, if previous measures could have been adopted to render its happening less probable or to prevent it altogether; and it does appear to me from the evidence that such timely measures might have been, but were not, taken by the Grace to bear away and thus avoid the accident.

The Ranger had the right of way, and was complying with the rule of the sea by holding to her proper course. The Grace knew she was approximating the Ranger, and the wind being heavy, baffling, uncertain and squally, all this should have put those on the Grace on their guard, and called for the exercise of the greatest caution on their part. They allowed themselves, however, to approach too close, or, as one of their own witnesses says, to shave too close before they took safe and necessary steps to get out of the way. When they did make the attempt to bear away it was too late. Before this the Grace had ample time to have kept clear, and to have avoided a collision, and it was her duty to have kept away and to leave the Ranger undisturbed on her tack. I can fully understand that when the Grace found herself so close to the Ranger, and that proximity rendered so dangerous by the increased puff or squall of the high wind already blowing, that a confusion arose on board of her in the hurry to let go their main-sheet and to get out of their difficult position; but all these efforts were then too late to ward off the imminent danger, which was the natural consequences of their own omission to take necessary precautions in due time.

I therefore do not regard the accident as one inevitable, because I am of opinion, under the evidence, that it might have been avoided by the exercise of due care and skill on the part of the Grace.

It was further contended on defendant's part that if the collision was not the result of inevitable accident, it arose wholly from the negligence and fault of those on board the Ranger. If this were so it would afford a complete answer to this suit, as the law is clear that if the complaining ship is proved to have suffered entirely in consequence of its own

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It was argued that the Ranger was at fault in not doing anything to avoid the accident, which it is said she might have done by luffing up into the wind. Let us refer to the evidence on this point. (Reads evidence on this point.)

Captain Northrup, of the Grace, says: "If the mate of the Ranger had put his tiller to port, and let her up in the wind, it would not have cut the wind out of my fore-sail, and I could have gone clear of her easily."

Belyea says: "I think if the crew of the Ranger had let her up in the wind she would have kept out of our way. They kept on their course, and made no effort that I could see to avoid a collision."

Witness Whipple says: "I think if I were on board the Ranger I would have put my tiller to starboard and paid off before the wind, but no one could judge correctly unless they were on board the vessel what course to take. The time was very short after the Grace luffed up for the Ranger's crew to make up their mind; they could hardly tell what to do."

Witness Rose says: "The Ranger kept on her course. I think if she had kept up one point into the wind she would have gone clear of the Grace. They made no effort to come up into the wind. After the Grace came head to the wind there was no time for the Ranger to change her course so as to avoid a collision. If the Ranger had luffed up before they came so close she might have avoided it."

Witness Travis says: "I think there was no time to change her course. The Grace was so close that there was nothing the Ranger could do to avoid collision."

Captain McMulkin says: "When they got almost opposite to each other the Grace turned short and appeared to mount right on to the Ranger."

Captain Sellers, of the Ranger, says: "When the Grace got nearly abreast of our beam, two or three lengths distant, I considered that from the course the two vessels were taking they would go clear of each other, when all upon a sudden the Grace came to, head to the wind, not giving us time to

alter our course, she came into collision. I know nothing of the reason why the Grace luffed, except what I am told by Northrup and Belyea. No attempt was made by any one on board the Ranger to avoid the collision. The change of the course of the Grace was so sudden and unexpected that we had not time to do any thing to avoid the collision. The collision could not be avoided by anything which could be done by the Ranger or her crew."

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Melvin, the mate of the Ranger, says: "When the Grace was abreast of our main rigging, as near as I could judge between two hundred and three hundred feet distant from us, she rounded to into the wind and before we could change our course she struck us. I was steering at the time. I did not change the course of our vessel. I had no time to do so. There was nothing which we could have done to prevent the collision. I never saw that the Grace had become unmanageable or that a squall had struck her.

Dunham, the pilot of the Ranger, says: "We kept on our course, supposing the Grace would keep on hers. When we were about fifty yards apart the Grace brought up in the wind and ran into the Ranger. I think if he had kept on his course there was not the least danger of his running into us, as he must have gone under our stern. When he altered his course there was no time for us to alter ours before the Grace was into us. The collision could not have been prevented by any effort of the crew of the Ranger. The Ranger could not come up into the wind so as to avoid the collision or prevent its violence."

Captain Peck says: "It was only a minute's work; it was done very quick. I think the Grace might have kept clear, and I think the Ranger could not have kept clear of her. I don't think the collision happened from any squall, but from want of presence of mind of the parties in charge of the Grace. I think the Ranger could not help herself. The Ranger was not in a position to come up in the wind and make the collision more easy."

The great preponderance of this evidence goes to exonerate the Ranger from any blame for not having taken measures to avoid the collision, as there was no time for her to have

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The case of the *Lady Anne*, cited by Mr. Thomson, was very different. Although she was on the starboard tack, it was found that the master, who was near the helm, had plenty of time to have ported his helm and to have done what he ought to have done to keep calm, but that he did not do so. He did not alter his helm, although he saw that an accident would inevitably happen. Therefore the *Lady Anne* was held to blame.

So in *Wilson v. Canada Shipping Co.* (1) it was held that a starboard tacked vessel, when apprised of the helpless condition of a vessel, which, by the ordinary rules of navigation, ought to get out of her way, is bound to execute any practicable manœuvre which would tend to avoid a collision.

In the present case it was the duty of the *Grace* to give way, if she had the power to do so; that she had this power up to the time she lost the wind from her fore-sail by running too close under the lee of the *Ranger*, I entertain no doubt. The evidence also shews that up to the time when the *Grace's* head suddenly turned up river, those on board the *Ranger* had no reason to doubt the power of the *Grace*, either to go clear by continuing her course or to wear away in time.

In the case of *The Test* (2), one similar to the present, the Court held that it would be a very dangerous doctrine to hold, without evidence, that a vessel whose duty it was to keep her course ought to have deviated from that rule, there being no circumstance established by evidence to shew that she ought so to have done. Dr. Lushington there says: "I cannot conceive anything more likely to lead to mischievous consequences than that a vessel, whose duty it might be to keep her course, should anticipate that another vessel would not give way, and so give way herself, the consequence would be that there would be no certainty;

(1) 2 App. Cas. 389.

(2) 11 Jur. 998 s. c.; 5 N. of C. 276.

whereas the certainty which results from an adherence to general rules is absolutely essential to the safety of navigation. It is no defence to a vessel clearly in the wrong that the other vessel, at the moment of danger, did not use every means that might appear proper to a cool spectator, unless she can also shew such negligence on the part of the other vessel as materially contributed to the collision." Such negligence on the part of the Ranger, in my opinion, has not been shewn.

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Two witnesses, Mr. Luke Stewart and Mr. John Gibson, were examined on behalf of the respondent as to a conversation had by them, a few days after the collision, with the master of the Ranger, relating to the collision, in which they represent the master as stating that he observed some trouble on board the Grace whilst the vessels were two or three lengths apart; that Stewart asked the master if he had done anything to avoid the collision by putting his helm either up or down; that the master replied the mate was at the wheel at the time, and that the mate had done nothing but keep on his course; that to a question by Mr. Stewart whether, if he had made any effort by putting the helm up or down, the collision could not have been avoided, the master answered he could not say but it might; and further on, being asked why something was not done by the crew of the Ranger to avoid the collision, the master's answer, according to Mr. Gibson, was, that he was on his proper course or tack, and did not consider he had any right to alter it. The reply, according to Mr. Stewart, was, because he was on his course, and he was not bound to do it.

If the respondents had intended to bring this conversation forward as part of their defense, it would have been more satisfactory, and I think regular, to have set it out in the responsive allegation, whereby an opportunity would have been afforded for interrogatories and inquiry into the whole conversation. The respondents, however, neither asserted it in their pleading, nor interrogated the master concerning it. It was strongly pressed in the argument that these statements by the master must be taken against him as shewing that he had timely knowledge of the difficulty which had

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Upon the whole view of the case, I am of opinion that the collision was caused by the default and mismanagement of the Grace, and I pronounce for the damages accordingly.

DAMAGES.

| | | | | | |
|---|-----|-----|-----|-----|------------|
| Raising vessel, ... | ... | ... | ... | ... | \$140 00 |
| Repairs, materials and expenses,... | ... | ... | ... | ... | 586 44 |
| Paid Portwardens, ... | ... | ... | ... | ... | 25 00 |
| Freight to Fredericton, ... | ... | ... | ... | ... | 120 00 |
| Loss of time of Ranger, ... | ... | ... | ... | ... | 100 00 |
| | | | | | <hr/> |
| | | | | | \$971 44 |
| Interest from about 1st March, 1880, say 6½ mos., | | | | | 31 56 |
| | | | | | <hr/> |
| | | | | | \$1,003 00 |

I also give promovents their costs.

Decree accordingly.

It may be useful to trace the legislation both in England and Canada on the subject of Collisions at Sea. Under the *Merchant Shipping Act*, 1854 (17 & 18 Vict. c. 104, sec. 298), it is provided: "If in any case of collision it appears to the Court before which the case is tried that such collision was occasioned by the non-observance of any rule for the exhibition of lights or the use of fog signals, issued in pursuance of the powers hereinbefore contained, or of the foregoing rule as to the passing

of steam and sailing ships, or of the foregoing rule as to a steamship keeping to that side of a narrow channel which lies on the starboard side, the owners of the ship by which such rule has been infringed shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary." The effect of this section was to abolish the Ad-

miralty rule that a wrong doing ship shall recover half her loss if the other ship was also in fault. See *Marsden on Collisions* (3 Ed.) 39. *The Canadian Act* (31 Vict. c. 58, s. 6) enacts substantially in accordance with the 298th section of the *Merchants' Shipping Act*, 1854 (17 & 18 Vict. c. 304), that "If in any case of collision it appears to the Court before which the case is tried that such collision was occasioned by the non-observance of any of the rules prescribed by this Act, the vessel by which such rules have been infringed shall be deemed to be in fault; and the owner of such vessel shall not be entitled to recover any recompense whatever for any damage sustained by such vessel in such collision unless it can be shown to the satisfaction of the Court that the circumstances of the case rendered a departure from the said rules necessary." It was accordingly held, under this latter section, by the Vice-Admiralty Court of Quebec, in *The Eliza Keith*, Cook 107, that neither ship could recover where there had been a departure from the sailing regulations. This case was affirmed on appeal to the Privy Council, May 9th, 1878.

The Imperial Parliament amended 17 & 18 Vict. c. 104, sec. 298, by 25 & 26 Vict. c. 63, sec. 29. The latter Act, sec. 29, is as follows: "If, in any case of

collision, it appears to the Court before which the case is tried that such collision was occasioned by the non-observance of any regulation made by or in pursuance of this Act, the ship by which such regulation has been infringed shall be deemed to be in fault unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary." This section of the Act restored the Admiralty rule as to division of loss in cases where both vessels were in fault. For the cases decided in the High Court of Admiralty, under the provisions of this section, see *Marsden on Collision* (3rd Ed.) p. 40, Note h.

Under sec. 29 of 25 & 26 Vict. c. 63, it became necessary to decide in every case whether a ship infringing a regulation was guilty of negligence, and thereby causing or contributing to the collision.

In *Marsden on Collision* (3 Ed.) 40, it is said: "The application of the doctrine of Tuff and Warman prevented the above Statutes from having the effect desired by those who framed them. Attention appears to have been called to the subject by the decision in *The Fenham*, L. R. 3 P. C. 212, and 36 & 37 Vict. c. 85, s. 17, the enactment now in force was passed in consequence." The language of

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 "If, in any case of collision, it is proved to the Court before which the case is tried that any of the regulations for preventing collisions contained in or made under the *Merchants' Shipping Acts 1854 to 1873* has been infringed, the ship by which such regulation has been infringed shall be deemed in fault, unless it is shown to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary."

The following are some of the cases, in the High Court of Admiralty, decided under the last named section, viz.: *The Englishman*, 3 P. D. 18, *The Khe-dive*, 6 App. Cas. 876, *The Lepreaux*, 7 App. Cas. 512, *The Imbro*, 14 P. D. 73, *The Duke of Buccleuch*, 15 P. D. 86, s. c. 1891, A. C. 310, *The Ark-low*, 9 App. Cas. 136. The Canadian Parliament, following the example of the mother country, enacted, in 43 Vict. c. 29, sec. 6, now R. S. C. c. 79, sec. 5, that "If, in any collision, it appears to the Court before which the case is tried, that such collision was occasioned by the non-observance of any of the rules prescribed by this Act, the vessel or raft by which such rules have been violated shall be deemed to be in fault, unless it can be shown to the satisfaction of the Court that the circumstances of

the case rendered a departure from the said rules necessary."

Section 8 of this Act restores the Admiralty rule as to division of damages when both vessels are in fault.

It is important to notice that the Canadian Act, 43 Vict. c. 29, sec. 6, is almost identical with the English Act, 25 & 26 Vict. c. 63, sec. 29, and that there is a manifest distinction between the Canadian Act and the English Act now in force, 36 & 37 Vict. c. 85, sec. 17.

In *The Woodrop-Sims*, 2 Dods 83, a case of collision, Lord Stowell said: "There are four possibilities under which a loss of this sort may occur. 1st. It may happen without blame being imputed to either party, as when a loss is occasioned by a storm, or by any other *vis major*; in that case the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree. 2ndly. A misfortune of this kind may arise when both parties are to blame—when there has been a want of skill and due diligence on both sides; in such a case the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both. 3rdly. It may happen by the misconduct of the suffering party alone; and then the rule is, that the sufferer must bear his own

burthen. 4thly. It may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other." See *Marsden on Collision* (3 Ed.) 126, *Marsden's Ad. Cases*, 235 *et seq.* When Lord Chancellor Selborne introduced into the House of Lords the bill which afterwards became the Judicature Act of 1873, it was his purpose to abolish the rule as to division of damages, and in this respect assimilate Admiralty and Common Law, but the Registrar of the Admiralty Court (Mr. Rothery) vigorously protested, and it was abandoned. See *Maclachlan on Shipping* (4 Ed.) 318.

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THE ELYSIA A.—SIMPSON.

Bottomry Bond — Foreign Port — What — Necessity for — Validity of — Requirements.

A vessel owned and registered in New Brunswick was sent with a cargo of deals from that Province to Queenstown, Ireland, the intention being to sell her to best advantage, after arrival and discharge of cargo. Efforts to sell the vessel were not successful, and after remaining some time at Queenstown, the agent, by directions of the owner, instructed the captain to return with the vessel in ballast to New Brunswick. Unable to get needed funds from the owner or agent, to make necessary disbursements, for return voyage, the captain, after due notice, borrowed from plaintiff the required amount on bottomry and brought the vessel back to New Brunswick. After her arrival, the bondholder, not being able to obtain payment, began suit for recovery of the amount. The owner and mortgagees of the vessel objected to the validity of the bond, on the ground that, under the circumstances, the voyage was ended at Queenstown; that the vessel required no repairs for a new voyage; was in no distress, and that the captain had no right to give the bond. But

Held :—That as the vessel was sent for sale, and that not being effected, the return was but a continuation of the voyage across; that Queenstown was a foreign port; that as the captain was unable to get necessary funds in any other way, he was justified in borrowing on bottomry, and that the bond must be upheld.

This suit was originally begun by action of plea and proof, but subsequently by consent of parties was changed and conducted as a suit by act on petition.

C. W. Weldon, Q. C., for promovent, George Moloro.

C. A. Palmer for the Elysia A., owners and mortgagees.

The facts of this case, the evidence, and the arguments of counsel are fully dealt with in the following judgment of the Court.

WATERS, J. This was a suit upon a bond of bottomry promoted by George Moloro, of Queenstown, in Ireland, against the above vessel.

On the part of the bondholder it was alleged in the Act on Petition that in the month of September, 1878, the

schooner Elysia A., being the property of William C. Anderson, of Harvey, Albert County, in New Brunswick, and lying in the port of Queenstown ready to proceed on a voyage to Harvey in ballast, and the said master, standing in need of certain advances on account of the vessel, and to pay debts incurred for provisions and other necessary things for the vessel, which he was totally unable to defray, and being unable to obtain any moneys or credit, or obtain any funds from his owner, or moneys on his account, applied to the said George Meloro to advance the necessary sum, which he agreed to do on bottomry of the said vessel; that the said master did receive from the said George Meloro, for the necessary service and use of the vessel, the sum of £99 19s. 2d. sterling, for securing the repayment of which the master, on 23rd September, 1878, did execute a bottomry bond for that amount at the rate of £21 per cent. on the schooner, her tackle, apparel, and furniture, the bond to be payable within ten days after her arrival at Harvey, in New Brunswick; that the said vessel arrived in New Brunswick in the month of November, 1878, and that payment of the bond had been demanded by the legal holder and refused, whereupon a warrant for the arrest of the vessel was issued, when bail was put in on behalf of the owners to that action.

The answer to the Act on Petition, on behalf of the owner of the vessel, alleged that in the month of September, 1878, the vessel was the property of William C. Anderson, subject to a mortgage to James L. Dunn, Lorenzo H. Vaughan and Thomas A. Vaughan, then overdue, and on which there was due the sum of \$1,748.47; that on the 29th November, 1878, the mortgagees sold the vessel by public auction to one David Morrison by bill of sale duly registered at the port of St. John, the port of registry of said vessel; that in the month of September, 1878, the vessel was lying in the port of Queenstown, having proceeded there on a voyage from St. John with a cargo of deals; that the vessel was sent from St. John to Queenstown with the cargo of deals for the purpose of being sold; that she arrived in Queenstown in good order about 27th July, 1878, and not in need of any repairs; that she remained at Queenstown until 30th

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ELYSIA A. September, when she departed from Queenstown, but she was not at that time under any contract or charter party obliging her to proceed to any port, but was then about to embark on a new voyage; that the moneys were not advanced and paid by reason of the vessel undergoing repairs, or in payment of any repairs previously made.

That the master did not, before applying for the moneys, apply or attempt to apply to the owner of the vessel, nor did he in any way attempt to inform the owner or the said mortgagees of his necessity to obtain the said money, and in fact that no such necessity did exist; that at the time the vessel was at Queenstown the owner resided at Harvey, in New Brunswick, and the mortgagees resided at St. John, N. B., between which places and Queenstown there was telegraphic communication, and that there were weekly mails between the same places, taking from seven to nine days for their delivery at St. John and Harvey; that the said moneys were not advanced for the necessary service and use of the vessel, and were not used in payment of repairs or in the purchase of necessaries for the vessel; that the master was not totally unable to obtain any funds from the owner, and that he never applied to the owner for any sum, nor was any sum required for the vessel; that the master had no authority in law to borrow money on bottomry without notice to and the consent of the owner and mortgagees, nor should he have attempted to borrow money for the vessel or take her out of Queenstown without the direction of the owner and mortgagees.

The reply, on the part of the bondholder, pleaded: That the vessel was sent to Queenstown with a cargo of deals, and was in that port, when after endeavoring to sell the vessel, but no purchasers offering, the owner, on 29th August, sent to George Bell, of Dublin, who was acting as the owner's agent in Ireland, this cablegram: "Elysia return. Effect insurance on hull Elysia, £250;" to which George Bell replied by cablegram: "Vessel is detained in amount of £50. Cable banker's credit," to which no reply was received; that then George Bell wrote the master that he had no funds, and that he declined to make any advances on account of

the owner, and left the master to raise what funds he required to get the vessel out of port as best he could.

That the master having endeavored to obtain advances as well on the credit of her owner as of himself, and the vessel not being in good order and unready for sea without his obtaining such advances, and the master having also sent a cablegram to her owner and received no reply, and being in want of money to enable him to proceed to sea and to procure necessities and outfits for the vessel, did, by public advertisement, advertise for an amount of £100 sterling to be lent to him on bottomry of the vessel, he having no other means of obtaining the same, and the said George Meloro then agreed to advance and did advance the money upon bottomry of the vessel; that the said moneys were applied in fitting out and getting the vessel ready for sea and in providing necessities for her.

That before applying for the said moneys the master did apply as well to the owner of the vessel as to George Bell, the owner's agent in Ireland, informing him of the necessity which did exist, and of the moneys required, and that said George Bell did also inform the owner of such necessity.

That the said money was advanced for the necessary service and use of the vessel, and was used for payment of necessary repairs or in purchase of necessities for the vessel to enable her to proceed on her voyage.

That the master was totally unable to obtain any funds from the owner, and that he and the said George Bell did apply to the owner to obtain the necessary funds for the vessel.

That the master had authority in law to borrow the said moneys and give the bottomry, the master being unable to obtain them in any other manner and the owner having neglected to furnish the same.

That it was not necessary to have any directions from the mortgagees, or to give them any notice.

No rejoinder is made to this reply.

The case of the promovent is established by the production of proof by the execution of the bottomry bond, and by the deposition of James William Scott, of Queenstown, who

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ELYSIA A. swore that the Elysia A. arrived at the port of Queenstown in July, 1878, with a cargo of deals. That after the discharging of the cargo, George Bell, of Dublin, acting as agent for the owner, endeavored to sell the vessel, and being unable to do so she was ordered to return to Harvey.

That he (Scott) acted as agent of the vessel at Queenstown, and had made certain advances to the master to pay necessary disbursements connected with the vessel; that he received the freight on the cargo of deals, but that a balance still remained due to him.

That the master required further advances to furnish necessities to enable him to leave the said port; that upon application made to said George Bell, he wrote a reply that he had no funds and could not make any advances, but left the master to raise funds in the best way he could.

That the said master sent a cablegram to the owner of the vessel residing at Harvey, requesting funds to be remitted.

That having no reply, and he (Scott) declining to make any further advances, and the master being unable to obtain any money on his own credit, or the credit of his owner, and receiving no reply from his owner, had no alternative left but to endeavor to raise the amount by bottomry of the vessel.

That the said George Bell, the only representative of the owner, also communicated to him that this was the only course he should pursue to enable him to carry out the instructions received from the owner to proceed to Harvey.

That the master did then, by public advertisement, published in the Cork papers, advertise for tenders from parties willing to advance money on bottomry of the vessel.

That George Meloro offered to advance the requisite amount at a maritime premium of twenty-one per centum, which was the most advantageous offer, and was accepted, and the bottomry bond was made and executed by the master on the 23rd day of September, and the said George Meloro paid to the master the sum of £99 19s. 2d. sterling, which amount was expended in necessary disbursements to enable the vessel to proceed to sea (an exhibit of which disbursements in detail is annexed to the deposition).

That the vessel, shortly after the date of the bond, sailed, as directed by Mr. Bell, for Harvey, New Brunswick.

That the bottomry of the vessel was actually necessary to enable the master to raise the funds required to enable him to relieve the vessel from debt and to proceed to sea, and that without such hypothecation the master would have been utterly unable to relieve the vessel and proceed to sea; and that the bond was executed in good faith, and without any fraud or otherwise on the part of any person whatever.

There is also a deposition from the bondholder of the due execution of the bond, and that the loan was entered into by him in good faith.

On the part of the owners, the following evidence was offered:

1. Of the master, John E. Simpson, who swore that he sailed in the vessel to Queenstown with a cargo of deals, where he arrived about the 27th July, 1878.

That Queenstown was his port of destination, and that he believed the vessel was sent there for the purpose of being sold.

That when she arrived, the vessel was in good order, not needing any repairs.

That the vessel discharged her cargo and remained at Queenstown until about 30th September, and during that time was not in distress, nor in need of repairs.

That the Elysia A., when she sailed from Queenstown, was not under any contract or charter party compelling her to proceed to North America, nor was her so proceeding a continuation of any voyage, but the same was a new voyage.

That as there was no immediate prospect of selling the vessel, he concluded to bring the vessel out of the port of Queenstown, and bring her out to this Province, and for the purpose of paying the advance wages to a crew, and his own wages, and the other outward disbursements and bills of the vessel, he obtained the sum of £99 19s. 2d. on bottomry of the vessel now in suit.

That at the time he advertised for and received the said money, all the stores for the vessel had been purchased, and were on board the vessel, but not paid for.

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That he was not directed by William C. Anderson, the owner of the vessel, or by Major C. Anderson, the person who appointed him master, or by the mortgagees of the vessel, to take the vessel out of the port of Queenstown.

That he did not communicate with them, or either of them, in relation to borrowing money on bottomry of the vessel.

That he had no directions from them, or either of them, to bottomry the vessel.

That the reason he borrowed the money and gave the bottomry bond was that he was advised and informed that he could lawfully do so by Mr. Scott, at Queenstown.

That the vessel did not receive any repairs, nor was she in a damaged condition or in need of any repairs from the time he became master of her in July, 1878, until the issuing of the warrant in this action in December last.

The depositions of Lorenzo H. Vaughan and Thomas A. Vaughan were also read on behalf of the respondent, alleging that in July, 1878, they and James L. Dunn were mortgagees of the Elysia A.; that the vessel was sent from St. John to Queenstown for the purpose of being sold; that she arrived at Queenstown in good condition; that William C. Anderson was the registered owner.

That the vessel, when she left Queenstown, was beginning a new voyage, she not being then under any contract or charter party to proceed to North America, or on any voyage.

That the bottomry bond was given without any notice to the mortgagees, or either of them.

That the vessel arrived in St. John in November, 1878, up to which time she had not received any repairs or been in any distress, and that no part of the money from the bottomry bond was expended in payment for any repairs.

That the bringing the vessel from Queenstown on this voyage, and the expenses incident thereto, caused the mortgagees to lose part of their debt; that they knew the vessel would have sold at Queenstown for more than sufficient to pay the amount due on their mortgage.

That when the vessel was at Queenstown, the Messrs. Anderson resided at Harvey, N. B., and the mortgagees at St. John, N. B., and that immediate means of communication

existed between Queenstown and Harvey and St. John by a weekly mail, by which a letter could be sent in from seven to nine days from Queenstown to Harvey, or St. John.

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The grounds of objection urged against this bond :

1. That the Elysia A., having been dispatched with a cargo of deals to Queenstown, where it was intended that she should be sold, the port of Queenstown became thereby her port of final destination, and that, being in that British port, her voyage was up ; and that no bottomry bond could be then taken for the purposes of a new voyage, and it was strongly contended that no master in a British ship in a British port, on a new voyage, can bottomry a vessel.

2. That the vessel, not requiring any repairs, and not having been in any distress, there was no necessity existing to warrant the master in giving a bottomry bond.

3. That the master, before giving the bond, did not apply, or attempt to apply, to his owner, nor did he inform him or the mortgagees of his necessity and obtain the money.

As to the first ground, that the original voyage was ended when the vessel arrived at Queenstown, where she was sent on sale, it must be remembered that the Elysia A. was a Canadian foreign sea-going vessel, registered in New Brunswick ; that she had sailed from New Brunswick with a cargo of deals for Queenstown, where the owner contemplated selling her ; whilst she lay at Queenstown she was, therefore, at a foreign port. It is alleged by the promovent in his pleadings, and not denied by the owner, that no purchasers offering to buy the vessel, the owner sent to Mr. George Bell, his agent at Dublin, this cablegram on 29th August, 1878 : "Elysia return ; effect insurance on hull, £250." To which Mr. Bell replied : "Vessel is detained on account of £50 ; cable bankers"—to which the owner sent no reply. Under these instructions it became the duty of the master to obey her owner, and bring the vessel to her home port, and his power for that purpose would be as full as if he had sailed from New Brunswick with the original intention of making a return voyage, and such return of the vessel to New Brunswick I should consider as a continuation and completion of her original voyage.

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The principle contended for might apply successfully if the bond had been given by the master in his home port prior to the commencement of a voyage; but, as I have remarked, this vessel was in a foreign port, and on her return voyage to the country where she belouged. On this point I would refer to the *Adonis*, (1), where the validity of a bond was held not affected by the circumstance of the money being advanced before an intervening voyage, if given for advances necessary for the vessel to prosecute and complete the original voyage.

Next, did a necessity exist for giving this bond? It is well established law that it is that state of unprovided necessity that alone supports these bonds, and the absence of that necessity is their undoing. *The Nelson* (2).

The want which exacts the loan must be such as, if not supplied, would prevent the prosperous completion of the voyage, including, therefore, indispensable repairs to the ship and necessary provisions for the people on board.

A master entering a foreign port in need of necessaries from distress or otherwise, may incur debts for repairs or necessaries; these debts may be purely personal, but he may borrow on bottomry from any one not the creditor to pay such debts. *The North Star* (3).

In the case of *The Karnak* (4), before the Privy Council, the Court says: "When a master cannot in any other way raise money which is indispensably necessary to enable him to continue his voyage, he may hypothecate the ship; this power would extend to a case where the ship might be arrested and sold for a demand for which the owner would be liable. It seems immaterial whether the necessity for funds arose from such a demand or to pay for repairs, stores or port duties." In the case of *Beldon v. Campbell* (5), Baron Parke, in speaking as to what constitutes necessaries for a ship, says: "The master is appointed for the purpose of conducting the navigation of the ship to a favorable termination, and he has, as incident to that employment, a right

(1) 2nd Stuart, Ad. Rep. 125.

(2) 1 Hagg. 176.

(3) Lush. 50.

(4) L. R. 2 P. C. 505.

(5) 6 Ex. 886.

to bind her owner for all that is necessary ; consequently he has perfect authority to bind her principal owner as to all repairs necessary for the purpose of bringing the ship to its port of destination ; and he has also power, as incidental to his appointment, to borrow money, but only in cases where ready money is necessary, that is to say, when certain payments must be made in the course of the voyage, and for which ready money is required. An instance of this is in the payment of port dues, which are required to be paid in cash ; or lights, or any dues which require immediate cash payments. So also in the case referred to in the course of the argument, *Robinson v. Lyall* (1), where a ship, being at the termination of the voyage, and about to proceed on another, money borrowed to pay the wages of seamen, who would not go on the second voyage without being paid, was considered necessary. See also *The Osmanli* (2), where a bond given for the purpose of raising supplies necessary to bring the vessel from Malta was pronounced for.

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It was also urged against this bond that the money raised was used to repay moneys advanced to the master whilst the vessel was lying at Queenstown, and for supplies presumably purchased there, and which were at the time the bond was executed, on board of the vessel. This would, I think, make no difference provided the advances were made and the stores supplied on the understanding that they were to be secured by a bottomry of the ship. Lord Stowell, remarking on a similar objection, says it was of no consequence whether the money was advanced at once, and the bond immediately entered into, or whether the master received it at different times and gave a bond for the whole amount. In the case of *The Karnak* (3), the judge held that in the case of money already supplied without any previous agreement, it is to be presumed, in absence of all evidence, that the foreign lender made the advances in contemplation of bottomry security, and the presumption is increased when the *lex loci* empowers the lender to arrest the ship in satisfaction of his demands, and this power of arresting the vessel,

(1) 7 Price 592.

(2) 3 W. Rob. 219 ; s. c. 7 N. of C. 322.

(3) L. R. 2 A. & E. 289.

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THE & 31 Vic., c. 114, sec. 31, relating to the Court of Admiralty
ELYSIA A. in Ireland.

I consider it proved by the evidence that the advances and supplies furnished to the master in this case were necessities for the immediate use of the vessel, and to enable her to leave Queenstown, and that the master was unable to obtain any money on his own credit, or the credit of her owner, and had no means of raising the money except by bottomry, the allegation to the contrary in the responsive allegations on behalf of the owner are not sustained, or attempted to be sustained, by any evidence whatever.

The bond is also impeached on the ground that there was not sufficient communication with the owner or mortgagees of the vessel prior to the execution of the bond. The contrary of this is alleged by the promovent, in his pleading, when he sets forth that the master did apply as well to the owner of the vessel as to George Bell, acting for her as agent in Ireland, informing him of the necessity that existed for the money, and that the said George Bell also informed the owner of such necessity. Now what is the purport of the evidence of the bondholders to prove such communication. The allegation, in his reply, and the defendant's answer, when he says: "That after endeavoring to sell the vessel, and no purchaser offering, the owner, on 29th August, sent to George Bell, of Dublin, who was acting as the owner's agent in Ireland, this cablegram: 'Elysia, return, effect insurance on hull, £250;' to which George Bell replied by cablegram, 'Vessel detained on account of £50, cable Bankers.'" The material allegation being uncontradicted by any plea or evidence, I must rule as admitted to be true. Here there is an order for the owner in New Brunswick to his agent in Ireland for the return of the vessel to New Brunswick, and a direct reply that the vessel was in financial trouble, and detained for an account of £50. To which no reply was received.

That George Bell wrote the master that he had no funds, and that he declined to make any advances on account of the owner.

There is the further allegation that before applying for the money on bottomry, the master did apply as well to the owner as to George Bell, informing them of the necessity which existed for the money, and that being totally unable to raise any, the master and George Bell did apply to the owner for the necessary funds for the vessel. To this most important and material allegation there is no contradiction or explanation whatever offered on behalf of the owner.

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The evidence of William Scott on this point is, that upon application to George Bell, he wrote in reply that he had no funds, and left the master to raise funds in the best way he could, and that the master sent a cablegram to the owner requesting funds to be remitted; that no reply being received from the owner, George Bell communicated to the master that bottomry was the only course he should pursue to enable him to carry out the owner's instructions to proceed to Harvey.

The deposition of the master, William E. Simpson, which should have set forth all the facts bearing upon the case within his knowledge in a clear and candid manner, is to my mind neither clear nor satisfactory. He makes no allusion to the cablegrams alleged to have passed between her owner and George Bell, and leaves it to be inferred that the bringing of the vessel out of the port of Queenstown was his own act alone, uninfluenced by any instructions from her owner or Mr. Bell. He says: "As there was no immediate prospect of selling the vessel, he concluded to bring the said vessel out of the said port of Queenstown, and bring her out to the Province of New Brunswick, and for the purpose of paying the advance wages to a crew, and of paying my own wages and the outward disbursements and bills of the said vessel, I obtained the sum of £99 19s. 2d. sterling on bottomry of the vessel."

He further states that he was not directed by the owner nor by the mortgagees to take the vessel out of the port of Queenstown, again ignoring the uncontradicted allegation that her owner had sent such instructions to his agent, George Bell; neither does he set up any denial of his knowledge of these cablegrams.

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It may be literally true that he was not personally directed by her owner to bring out the vessel, whilst I believe it to be really true that he brought her out in consequence of the order contained in her owner's cablegram to Mr. Bell. On the ground of want of communication to her owner, he is equally guarded and reserved in his language. He says: "That he did not communicate with her owner or the mortgagees relative to borrowing money on bottomry of the vessel, and that he had no directions from them to bottomry the vessel." This does not meet the allegation in the pleading of the bondholder, when he says that the master, before applying for moneys from the bondholder, applied to her owner informing him of the necessity which existed, and of the money required.

The statement in the master's affidavit that he did not communicate with her owner relative to borrowing money on bottomry may be itself true, whilst it may be also true as a fact that he communicated to her owner the necessity the vessel was in for funds to enable her to leave Queens-town. Again, we have no plea or rejoinder denying the allegation in the bondholder's reply to the answer. That before applying for the moneys the master did apply to the owner informing him of the necessity the vessel was in; if this averment was untrue, the evidence of the owner himself would have been most important to show the contrary; the absence of any evidence from the then owner, whose testimony, if deemed important, could have been obtained through the process of the Court, leads to the inference that, if produced, it would not tend to the benefit of the defence.

With the evidence now before me, and in the absence of any thing to the contrary from the then owner, I conclude that both the master and Mr. Bell did communicate to the owner full information of the wants of the vessel to enable them to obey his orders for a return of the vessel to New Brunswick, and that his silence authorized the master to take such measures as were expedient, and such as a prudent master would take who could not get instructions from her owners. A direct application for authority to raise money on bottomry

need not be made. It was held in the case of the *Bonaparte* (1) that a letter from the British Consul in a foreign port, written on behalf of the master, informing the consignees in England of the damage sustained by the vessel, but making no application for money, nor referring to the necessity for repairs, was sufficient notice for the purpose of raising money on bottomry.

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This was, therefore, a bond given for necessary disbursements in a foreign port, where the owner had no present credit; where the master was without funds, and without the means of raising funds, except upon the credit of the vessel; both the agent of the owner and the master were aware how necessary it was that money should be raised to enable the vessel to leave Queenstown and return home, where she had been ordered by the owner. The owner had been communicated with and no reply had been given by him. Mr. Bell had advised the master to raise money as best he could, and the master acting under these circumstances, advertises for the money, which is advanced by Mr. Meloro, as I think, *bona fide*, and is legitimately, in my opinion, used by the captain in discharging claims thus existing against the vessel and to enable her to go to sea.

When a case of necessity is established, and the want of personal credit is beyond question, and no imposition has been practised upon the master, it is as a general rule considered important for the security and promotion of commercial interests that bonds of this description should be supported. The presumption in such cases is that the master, acting as the agent of her owner, would perform his duty honestly and would not unnecessarily subject the property of his principal to heavy burdens, and notwithstanding the character of the evidence now given by the master, I am of opinion that at the time he executed the bond he adopted that course which he believed to be for the benefit of all parties concerned in the vessel.

As to the ground of objection raised that the master did not apply, or attempt to apply, to the mortgagees of the vessel prior to the execution of this bond, there is no aver-

(1) 17 Jur., 235 s. c., 8 Moo. P. C. 473.

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ment or evidence that the mortgagees named were mortgagees in possession, or that the voyage was undertaken for their benefit, or that the master or ship's agent, George Bell, or the bondholders, had any knowledge of the existence of the mortgage. Therefore I must hold that the ground of objection must fail.

Under all the circumstances of this case, I pronounce for the validity of the bond, and, of course, with costs.

Decree accordingly.

The judge referred it to the Registrar to ascertain the amount due on the bond, and on a later day he reported due \$588.59 principal, and \$36.70 interest, at six per cent., from Dec. 6, 1878, the time when the bond became payable, to December 20th, 1879, the date of the decree, in all \$625.25. Respondents objected to this rate of interest, claiming it should only be four per cent., the rate allowed in England. The Registrar held that the legal rate allowed at the place of payment should prevail, and on appeal to the judge, this ruling was sustained.

The contract of hypothecation was familiar to the Roman law. From the Pandects it is shown that the master might, under stress of necessity, borrow money on the credit of the ship, but bottomry, as at present understood and applied, has grown to importance since the time of Grotius. *Browne Civil and Ad. Law*, vol. 2, p. 195. According to *Browne*, vol. 2, p. 196,

"Bottomry is a contract for money lent upon the vessel, on condition that if the ship be lost the lender loses his money; but if the ship returns in safety he is to receive his principal, and also interest even beyond the legal rate, on account of the extraordinary hazard, and for the benefit of commerce." Mr. Phillips, in his work on *Insurance* (5 ed.), vol. 1, s. 298, says: "A marine hypothecation is a maritime contract whereby the owner or his agent pledges his ship or goods as security for a debt accruing on account of advances or other consideration, and payable on condition of the subject being safe, or in proportion, or to the amount of the part of it saved, from the marine perils specified in the contract." The interest charged is beyond the common rate, and is denominated *marine interest*. Another writer thus defines it: "The contract of bottomry is in the nature of a mortgage of a ship, when the owner of it borrows money to

enable him to carry on the voyage, and pledges the keel or bottom of the ship as a security for its repayment; and it is understood that if the ship be lost the lender also loses his whole money; but if it return in safety then he shall receive back his principal, and also the premium or interest stipulated to be paid, however it may exceed the usual or legal rate of interest." *Park on Marine Insurance* (5 ed.) 410. As to the distinction between *bottomry* and *respondentia*, the same writer says: "In this consists the difference between *bottomry* and *respondentia*; that the one is a loan upon the ship, the other upon the goods: in the former the ship and tackle are liable, as well as the person of the borrower: in the latter, for the most part, recourse must be had to the person of the borrower" (*ibid*). In *MacLachlan on Shipping* (ed. of 1892), p. 512, *bottomry* is said to be "an agreement entered into by the owner of a ship, or his agent, whereby, in consideration of a sum of money advanced for the use of the ship, the borrower undertakes to repay the same, with interest, if the ship terminate her voyage successfully, and binds or hypothecates the ship for the performance of his contract. The contract, which must be in writing, by which this hypothecation is effected, is sometimes in the shape of a deed poll, and is then

called a *bottomry bill*; sometimes in that of a bond. Whatever be its form, the contract should be clearly set out in it. The essence of the contract is that there should be a maritime risk to be ascertained from the writing." And again, on p. 513: "If ship, freight, and cargo are hypothecated, the contract is *bottomry*; when cargo only is hypothecated the contract is *respondentia*." Such a bond cannot be given for a debt incurred on a former voyage. *The Hero*, 2 Dods 147, and if the money was advanced, or the indebtedness incurred on personal credit, a *bottomry* bond could not afterwards be given to cover the advance. *The Augusta*, 1 Dods 283. Where it is practicable to communicate with the owner, his consent must first be obtained. *The Oriental*, 7 Moo. P. C. 408; *The Olivier*, Lush. 484, and such communication must state not only necessity for expenditure, but also the necessity for hypothecation. *Kleinwort in Cassa Marittima of Genoa*, 2 App. Cas. 156. Dr. Lushington says: "It is not competent to the master, with the consent of the owner, to grant a valid *bottomry* bond upon a British ship lying in a British port for a new voyage." *The Royal Arch*, Swa. at p. 276. It would be otherwise, however, if the ship were in a foreign port. The ports of the Dominion of Canada are

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home ports so far as bottomry is concerned. *The Three Sisters*, 2 Stuart, 370 s. c.; Young's Ad. Decisions, 149. Under the Vice-Admiralty Courts' Act, 1863, the Dominion of Canada is not a possession within the meaning of that Act, so as to enable a Vice-Admiralty Court established in one Province to entertain jurisdiction over a vessel registered in another Province for the enforcement of claims between owners. *The Edward Barrow*, Cook 212. This question of jurisdiction is now regulated in Canada by the Admiralty Act 1891, 54 & 55 Vict. c. 29. To give the Admiralty Court jurisdiction to enforce a bond, sea risk must have actually been incurred. *The Atlas*, 2 Hagg. 52. If the bond expresses a maritime risk, absence of provision for maritime interest will not invalidate it. *The Laurel*, Br. & Lush. 317. The bond will be valid even if there be no stipulation for interest of

any kind. *The Cecelie*, 4 P. D. 210. A bottomry bond payable on arrival in England is triable by English maritime law, not by the law of the ship's flag or the place where executed. *The Hamburg*, Br. & Lush. 253. In this case Dr. Lushington, at p. 259, says that Lord Stowell, in *The Gratitude*, 3 C. Rob. 240, has exhausted all the authorities on this branch of the law. *Lloyd v. Guibert*, L. R. 1 Q. B. 115. Although the voyage may be illegal, yet a *bona fide* lender on bottomry can recover. *The Mary Ann*, L. R. 1 A. & E. 13. The validity of the bond depends on the necessities of the ship, and the authority of the master to borrow is based on such necessity. *The Pontida*, 9 P. D. 102, 177. As to priority of master's claim for wages see *The Edward Oliver*, L. R. 1 A. & E. 379; *The Daring*, L. R. 2 A. & E. 260; *The Eugenie*, L. R. 4 A. & E. 123.

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*Damage to Property—Jurisdiction—Extension of—Vice-Admiralty Courts Act,
1863, Sec. 10.*

A railway passenger car, standing upon a track on a wharf on the western side of the harbor of St. John, and within the limits of the city of St. John, was injured by a hawser attached and belonging to a steamship moored to the wharf.

Held:—That since the passing of the Statute 26 & 27 Vict., c. 24, sec. 10, the Vice-Admiralty Court has jurisdiction to entertain a claim for damage to property done by any ship, although the property injured is within the limits of a county, and situate upon the land.

The promovent, Joseph N. Green, was the owner of a passenger railway carriage, standing upon a railway track laid along a wharf on the western side of the harbor of St. John, and within the limits of the city of St. John.

The steamship Teddington, while the passenger car was standing upon the railway track on the wharf, was moored to the wharf by a hawser owned by and attached to the steamer. In changing the position of the steamer at the wharf the hawser by some means came into contact with the passenger car, through negligence and carelessness on the part of the steamship, and in consequence the passenger car was overturned, thrown from the track, and greatly damaged. The steamship was arrested under a warrant issued out of this Court. The respondents, the owners of the vessel, entered bail and appeared under protest, denying the jurisdiction of the Court on the ground that the property injured at the time was on the land and within the body of a county, and they therefore prayed that the judge pronounce for the protest, and dismiss the defendants and their bail from the action. After argument, the Court pronounced in favor of the jurisdiction, overruled the protest, and assigned the respondents to appear absolutely.

Geo. G. Gilbert, Q. C., for promovent.

D. S. Kerr, Q. C., and *John Kerr*, for respondents.

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And now (Nov. 14th, A. D. 1881), the following judgment was delivered by

WATERS, J. This is a cause of damage promoted by Joseph N. Green against the steamship Teddington. The affidavit upon which the warrant issued alleges that the said Joseph N. Green is the owner of a passenger railway car, and that while the said car was standing on the railroad track at Sand Point, in Carleton, in the city of Saint John, it was overturned from off the said track by the hawser of the said steamship, and by the careless, negligent, and improper manner in which the said steamer was managed. That the hawser at the time of such damage was attached to the said steamship, and secured the said ship to the wharf.

An appearance has been entered under protest by the owners of the steamship, who have filed an act on protest, in which the jurisdiction of this Court is denied on the ground that the cause of action arose within the body of the city and county of Saint John. They allege, in their act, that the place where the collision in question happened, was on a railway wharf, called the Carleton Branch Railway wharf, situate at the easterly end of Protection street, in Brooks Ward, in that part of the city of Saint John called Carleton, and within the body of the city and county of Saint John, and not on the high seas, or within the jurisdiction of this Court, and that it is not a cause of damage, civil and maritime. At the hearing, affidavits were read on both sides.

The circumstances of the case appear to be these: That the steamship arrived in this harbor with a cargo of railway iron; that she was moored at the Railway wharf at Carleton, in the city of Saint John, where she discharged the iron; that on the 12th October last, at flood tide, whilst she was being moved from this wharf to another part of the harbor, as she swung around, her hawser, which was attached to the wharf upon which the railway car was standing, came in contact with the car, overturning it and doing the damage complained of.

The question to determine is whether this is a case of damage coming within the words of the 10th section of the

Vice-Admiralty Court Act of 1863, which gives jurisdiction to this Court over "*claims for damage done by any ship.*" The denial of the jurisdiction of the Court is urged by respondents' counsel on two grounds; 1, that the cause of action arose within the body of the city and county of Saint John; 2, that the article damaged was not a maritime object, and therefore the cause is not one of a civil or maritime nature, and that the *damage* named in the 10th section of the Statute means a damage done by a ship to a ship, and not a damage done to a person, or to any article or other thing except a ship.

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It is not necessary to follow all the arguments or review the history of the adjudications by which the Courts of Common Law in England formerly sought to limit the jurisdiction of the Court of Admiralty. That jurisdiction, until the Statutes of Richard II, extended to all maritime contracts, whether executed at home or abroad, and to all torts, injuries and offences on the high seas and in ports and havens, as far as the ebb and flow of the tide. The common law interpretations of these Statutes abridged this jurisdiction to things done wholly and exclusively upon the sea; but this interpretation, in the opinion of Mr. Justice Story, delivered by him in the case of *DeLorio v. Boit* (1), is indefensible upon principle, and he says the decisions founded upon it are inconsistent and contradictory. He shows, notwithstanding, that the interpretation of the same Statutes by the Admiralty does not abridge any of its ancient jurisdiction, but leaves to it cognizance of all maritime contracts and all torts, injuries and offences upon the high seas, and in ports as far as the tide ebbs and flows. This judgment of Judge Story I find referred to and approved of by Sir Robert Phillimore, Judge of the High Court of Admiralty, in the late case of *The Sylph* (2), which was a case of personal damage done by a ferry-boat on the river Mersey. He says "that this Court had original jurisdiction in such a case as the present, I have no doubt whatever. It is given by the terms of the Patent under which I hold my office, and it is clear from the old authorities that the Court had

(1) 2 Gall. Rep. 398.

(2) L. R. 2 A. & E. 24.

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The jurisdiction of the High Court of Admiralty was, however, very much extended by the Imperial Statutes passed in the years 1840 and 1861. The seventh section of the Act of 1861 enacts that the Court "shall have jurisdiction over any claims for damage done by any ship;" and the jurisdiction of the Vice-Admiralty Courts was also extended by the Imperial Act of 1863, which, amongst other clauses, contained a provision in its tenth section similar to the above, viz., that these Courts shall have jurisdiction over "claims for damage done by any ship." The expressed object of the two Statutes of 1861 and of 1863 being to extend the jurisdiction of the respective Courts, and the words of the two sections referred to being so similar, the decisions of the High Court in construing the meaning of the seventh section of the Act of 1861 are very applicable, and may be safely followed in construing that portion of section 10 of the Act of 1863 relating to this Court.

In the case of the *Malvina* (1), decided in 1863, objections to the jurisdiction of the Court similar to those raised in the present case were made. The case was one of collision, where the *Malvina*, a steamer trading between Belfast and London, ran down a barge in the river Thames. An objection was taken to the jurisdiction of the Court, that the collision took place within the body of a county, and that the barge was not a ship or sea-going vessel. The Court said: "This is an action brought by a barge against a sea-going vessel for collision in the river Thames, and within the body of a county, and the question is whether this Court has jurisdiction. I am clearly of opinion that it was the intention by the Act of Parliament, and in the words of the seventh section, to give this Court this power and authority. Difficulties have constantly occurred before from the Statute of Richard II, but I am of opinion that now the question

(1) 1 Moore P. C. N. S. 357; s. c. Lush. 493; Br. & Lush. 57.

is wholly removed by these most expressive words, 'The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.' The words 'sea-going ship' and 'body of a county' are not used, and I am glad they are not, for constant confusion has arisen from them. The utmost jurisdiction is now given to the Court in cases of collision."

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This judgment was appealed from, but the Court of Appeal held that the objections to the jurisdiction of the Court of Admiralty could not be sustained.

In the case of the *Sylph* (1), it was held that the Court, under the seventh section of the Act of 1861, had jurisdiction in a cause of damage for personal injuries. A diver, whilst engaged in diving in the river Mersey, was caught by the paddle-wheel of a ferry steamer, and sustained injuries. It was objected that the word "damage," in the 7th section, means damage to property, and not to person. The Court said: "By the Act of 1861, the jurisdiction was much extended; the seventh section, which deals with the subject of damage, does not particularize any circumstances to which the jurisdiction of the Court is to extend, but gives the Court jurisdiction in the widest and most general terms. In the case of the *Malvina*, it was held that the utmost jurisdiction was given to the Court, and that the seventh section extended to the body of a county."

Also in the *Betu* (2), the Court held that the words of the seventh section include every possible kind of damage.

So, in the case of the *Uhla* (3), which was a case of damage done by a ship to a breakwater, and in the case of the *Andalusian* (4), which was a case of collision which took place in the river Mersey by the *Andalusian* being launched stern foremost into the river, and striking the *Angerona*, and in the case of the *Clara Killam* (5), which was a suit brought by a telegraph company for damage done to a telegraph cable which had got foul of the anchor and had been cut by order of the master; the jurisdiction of the Court was held to apply.

(1) L. R. 2 A. & E. 24.

(3) L. R. 2 A. & E. 29 n.

(2) L. R. 2 P. C. 447.

(4) 2 Pro. Div. 231.

(5) L. R. 3 A. & E. 161.

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 TEDDINGTON The case of the *M. Moxam* (1) was a cause of damage instituted against an English steamship and her freight for £2,500 for collision with a pier of the plaintiff's in Spain. The owners of the ship alleged that the pier formed part of the land of Spain, and that by the laws of the place the ship was not liable; the Court, however, sustained its jurisdiction, saying "the damage of which complaint is made must be taken to have been inflicted by a British merchant ship while in water subject to the Admiralty jurisdiction within the ebb and flow of the tide upon a pier on the territory of Spain. The act of injury was done from the merchant vessel at sea, though the object injured was situate on the land."

These and other decisions made since the passage of the Admiralty Act of 1861 clearly establish the jurisdiction of the High Court of Admiralty in England over all causes of damage done by a ship, whether upon the high seas or upon public navigable water within the body of a county.

Mr. Roscoe, in his work on Admiralty Practice, p. 25, says the jurisdiction of the Admiralty over actions of damage is at the present day based partly on its original jurisdiction and partly on the modern statutes. Under the seventh section of the Act of 1861 it has been held that it includes all injuries done by ships to ships, or by ships to things other than ships, or by other objects to ships, wherever the damage is done.

A similar jurisdiction has been asserted and exercised by the Vice-Admiralty Courts of Quebec and Nova Scotia. In the case of *The Wavelet* (2), for collision in the harbor of Halifax, and in the case of *The Chase* (3), in a cause of damage done by a ship to a wharf in Halifax harbor, Sir William Young held that the Court of Vice-Admiralty had jurisdiction.

In this Province this Court has, within the past few years, exercised jurisdiction in cases of collision arising upon the public navigable waters of the river St. John. No question of jurisdiction was raised in any of these cases, although

(1) 1 Pro. Div. 43, 107.

(2) 2 Stuart's Rep. 354; s. c. Young's Ad. Decisions 34.

(3) 2 Stuart's Rep. 361; s. c. Young's Ad. Decisions 113.

each was strongly contested on other grounds by the respective respondents. After hearing all the arguments I entertain no doubts in the present case. The reasoning in the English decisions upon the Admiralty Act, 1861, which I have cited and referred to, I adopt as directly applicable to the questions raised in this case, and as conclusively establishing that the case falls within the jurisdiction given to this court by the Vice-Admiralty Act, 1863. I therefore overrule the protest with costs and assign the owners to appear absolutely.

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Ordered accordingly.

In A. D. 1663 the Court of Delegates reversed a sentence of the Admiralty Court, and condemned the Susan and owners in damages for injury sustained by the Warewell and her cargo, caused by those on board the former vessel leaving their anchor in the river Thames without a buoy. Marsden's Ad. Cases, 243. See also a similar judgment, *Munday v. The Mary*, *ibid* 284 (A. D. 1703). The Imperial Statute 3 & 4 Vict., c. 65, sec. 6 (1840), enacted "that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of . . . damage received by any ship or sea-going vessel, . . . whether such ship or vessel may have been within the body of a county or upon the high seas at the time when . . . damage received." This Act conferred upon the Admiralty Court a jurisdiction as to contract and damage arising within the body of a county

which it did not then possess. But it did not give jurisdiction to proceed against a foreign vessel for damage to a barge in the Thames. *The Bilboa*, Lush. 149 (1860). The jurisdiction was still further enlarged by the statute 24 Vict., c. 10, sec. 7 (the Admiralty Court Act, 1861), whereby the High Court could entertain "any claim for damage done by any ship." It was held the Court had no jurisdiction under these Acts to entertain a claim for damages against a steam-tug occasioned to the vessel towed by negligent towing, where the damage arises not by collision, but by the vessel taking ground. *The Robert Pow*, Br. & Lush. 99. The Vice-Admiralty Courts Act, 1863 (26 & 27 Vict., c. 24, sec. 10), gave jurisdiction to Vice-Admiralty Courts to entertain "claims for damages done by any ship." The decided cases under these Acts naturally relate (1) to damage or injury to property, (2) to the person.

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The Court has jurisdiction, under section 7 of the Act of 1861, over a cause of damage done by a sea-going vessel to a barge within the body of a county. *The Malvina*, Lush. 493 (1862). This case was affirmed on appeal, and the Judicial Committee, in delivering judgment, held that it was intended by section 7 "to give the utmost extent of jurisdiction to that Court in cases of collision." *ibid*, Br. & Lush. p. 58. To the same effect, see *The Pieve Superiore*, L. R. 5 P. C. 482. Under this section the Admiralty Court has jurisdiction in a cause of collision between two British ships in foreign inland waters. *The Diana*, Lush. 539; and also in a case of collision between foreign vessels in foreign waters. *The Courier*, *ibid* 541 (1862). The Court, under it, has jurisdiction in a claim for damages against a vessel for injury to a breakwater. *The Uhla*, 19 L. T. R. 579; s. c. L. R. 2 A. & E. 29 n. (1867); and also for damage done by the anchor of a ship to a marine cable. *The Clara Killam*, L. R. 3 A. & E. 161 (1870). The Court has original jurisdiction over a collision committed on the high seas. *The Sarah*, Lush. 549; but under the Merchant Shipping Act, 1854, section 527, suit against a foreign vessel is confined to damage to property, not for injury

to person. *Harris v. The Owners of the Franconia*, 2 C. P. D. 173.

By section 10 of the Act of 1863, Vice-Admiralty Courts were given jurisdiction in case of damage similar to that of the High Court in England. In the case of *The Chase*, Young's Ad. Decisions, 113 s. c., 2 Stuart 361 (1872), the vessel was held liable for damage done to a wharf in Halifax harbor. This case was subsequently affirmed on appeal to the Judicial Committee, 22nd July, 1873.

A similar jurisdiction was also exercised in Quebec, where a sailing vessel, through negligence, having injured a wire cable under the river St. Lawrence, was held liable for the damage. *The Czar*, Cook 9 (1875). But when injury has been done to a wharf, the Court has not jurisdiction to award consequential damages occasioned to the traffic of a lessee. *The Barcelona*, Cook 311 (1882). See also *The Submarine Telegraph Co. v. Dickson*, 15 C. B. N. S. 759; s. c. 11 Jur., N. S. pt. 1, p. 211.

INJURY TO PERSON.

For a list of cases of injury to person, see Marsden's Ad. Cases, 311. In *Drew v. Hardwicke*, *ibid*. 315 (1740), a decree for wages, and also for ill-usage was made against the master. The Court, in *The Ruckers*, 4 C. Rob. 73 (1801), sustained an action for damage for personal assault.

by the master against a passenger. A diver injured in the river Mersey by the paddle wheel of a steamer was allowed to proceed *in rem.* for damages. *The Sylph*, L. R. 2 A. & E. 28 (1867). Damages for loss of life are recoverable under Lord Campbell's Act by the relatives or representatives of persons killed by collision. Marsden on Collisions (3 ed.) p. 122—9 & 10 Vict., c. 93., 27 & 28 Vict., c. 95. But there has been much conflict of authority as to the right of the Court to proceed *in rem.* for such injury. Sir Robert Phillimore, in the case of *The Guldfax*, L. R. 2 A. & E. 325 (1868), held, but with some doubt, that the Court had such jurisdiction. The point came before the Judicial Committee in *The Beta*, L. R. 2 P. C. 447, (1869), on appeal from the High Court of Admiralty, and was decided in the same way. The provisions of Lord Campbell's Act were held to extend to a case where the person in respect of whose death damages were sought, was an alien, and at the time of his death on board a foreign vessel on the high seas. *The Explorer*, L. R. 3 A. & E. 289 (1870). But *The Beta* was dissented from in *Smith v. Brown*, L. R. 6 Q. B. 729 (1871), in which, on application for prohibition, it was held that the Court of Admiralty had no jurisdiction to entertain a suit *in rem.*

under 9 & 10 Vict., c. 93, for personal injuries resulting in death, occasioned by the collision of two vessels. The question again came up for consideration in the case of *The Franconia*, 2 P. Div. 163 (1871), when Sir Robert Phillimore held that the Court had jurisdiction to entertain an action for damages against a foreign ship for injury resulting in death, and in the Court of Appeal this judgment was sustained by an equal division of the Court, James and Baggallay, L. JJ., in favor of, and Bramwell and Brett, L. JJ., dissenting from the Admiralty judgment. This left the law in an uncertain state, as there had been no judgment by the House of Lords. The point was again raised in *The Vera Cruz*, 9 P. D. 88, before Butt, J., who sustained the jurisdiction of the Court. The Court of Appeal, *ibid* 96, reversed this decision, holding that "an action *in rem.* against a foreign ship, under Lord Campbell's Act, 9 & 10 Vict., c. 93, s. 2, is not within the Admiralty Court Act, 1861, 24 Vict., c. 10, sec. 7, and therefore the Admiralty Division has not jurisdiction over such an action." This judgment of the Court of Appeal was affirmed by the House of Lords, 10 App. Cas. 59 (1884). This latter judgment has finally settled a question of considerable difficulty, and much conflict of judicial opinion.

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Ex parte WILLIAM MILBURN, SENIOR; JOHN MILBURN AND WILLIAM MILBURN, JUNIOR.

In re THE TEDDINGTON (1).

Prohibition—Jurisdiction—Damage Done on Land—Effect of Sec. 10 Vice-Admiralty Act, 1863.

The Vice-Admiralty Court, since the passing of the Vice-Admiralty Court Act, 1863, sec. 10, has jurisdiction to entertain a suit for damage done by a ship to property, although the property injured is on land, and within the body of a county.

The learned judge of the Vice-Admiralty Court in this case, when it was before him, pronounced in favor of the jurisdiction of the Court, overruled the respondents' protest, and assigned them to appear absolutely. Counsel for respondents then made an application in Chambers to Mr. Justice Palmer, one of the judges of the Supreme Court of New Brunswick, for an order, or rule *nisi*, calling upon the Vice-Admiralty Judge and the promovents in the cause in that Court to show cause why a writ of prohibition should not issue to stay all further proceedings in the Vice-Admiralty Court.

D. S. Kerr, Q. C., and *John Kerr*, for the application.

George G. Gilbert, Q. C., *contra*.

And now (December 20th, A. D. 1881), the following judgment refusing the rule *nisi* was delivered by

PALMER, J. This is an application for an order calling upon the Hon. Charles Watters, the Judge of the Admiralty Court, and also upon the promovents of a cause in that Court, to show cause at the next term of this Court why a

(1) See *Ante*, p. 46, for the judgment of Mr. Justice Watters. The application before Mr. Justice Palmer for a rule *nisi* for prohibition was not, strictly speaking, a proceeding in Admiralty. The judgment, however, is an important contribution to the elucidation of a much debated subject, and it has been deemed proper to insert it in this place.—ED.

writ of prohibition should not issue to prevent further proceedings in a cause for damage done by the said ship by a hawser coming in contact with a railroad car of the promoters, then on a wharf in Carleton, in the said city of St. John, which cause had proceeded in defiance of the applicants' (the owners of the ship) protest denying the jurisdiction of the Court.

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Judge Watters gave an elaborate opinion, overruling the protest, which I have before me. The applicants' contention is that the Vice-Admiralty Court has no jurisdiction over such cause, and to show this their counsel made two points:

1st. As the cause of damage occurred in the body of the city and county of St. John, such Court had no jurisdiction there.

2nd. Even if this were not so, as the thing to which the damage was done (a railway car) was a thing neither in the water, nor was in use either in marine matters or on the water, such Court had no jurisdiction.

I have come to the conclusion that the Vice-Admiralty Court has jurisdiction, although I disagree with the learned judge of that Court in his view, as expressed in the first part of his very able and well reasoned judgment, that the Admiralty had original jurisdiction in all ports and harbors, and I infer he means all other places where the tide ebbs and flows. This, it is true, has always been the extreme contention of most of the judges who sought to extend the jurisdiction of the Admiralty, and consequently the principles of the civil law, and has generally been put forward from time to time by eminent foreign civil lawyers and jurists, such as Judge Story and others, and sometimes we meet similar doctrine propounded by judges of the Admiralty in England, but on this view they were never allowed to act; and inasmuch as by the common law, which extends and was in force in every part of the territory of England itself, including all ports, harbors and rivers, but not to the extraneous seas, which I will call the *littoral* sea, or sea shore, to distinguish it from the tidal shores of the ports, bays, harbors or rivers, in order to clearly understand

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Some of the early common law judges, among whom was Lord Hale, were inclined to extend the territory of England much beyond this. They claimed that all the seas surrounding England were a part of the territory of England, and consequently denied the jurisdiction of the Admiral over them. Others claimed that the territory included a zone of three miles of the littoral seas, all around the kingdom, but Sir John Nichol, in the case of *Rex v. 49 casks of brandy* (1), settled the question as I have above stated, and this has always been acted upon since by the highest courts of the realm, and cannot now, I think, be questioned. He in that case says: "No person ever heard of a civil jurisdiction of the body of a county which extended three miles from the coast," and it has been uniformly held that all ports, harbors and tidal rivers in the kingdom were part of the territory of England, and that those places were not on the high seas. By the courts of the common law, cases were to be tried in the county where the cause of action arose, and when the commission of the Admiral only gave him jurisdiction on the high seas, and the common law courts were only given jurisdiction within the territory of England, it is easily seen that each jurisdiction was separate, and conterminous with the

(1) 3 Hagg. 257.

other, and the boundary of the territory was the boundary of each jurisdiction respectively. The counties extended on the littoral seas to low water mark, where the high seas began, when the tide was in to high water mark. As the law administered in the Court of the Admiral was largely founded on the civil law, the rights of parties were different when a cause happened upon the seas than if the same thing happened in the territory of England, where such right was governed by the rules of the common law. For instance, if a person's property was injured by the fault of the owner and also of another, by the common law the owner could recover nothing from the other party to blame. By the civil law, as administered by the Admiral, each party to blame would be made to contribute to the loss. Again, in the same case, if a third party's property was injured by the wrong of several, the Court of the Admiral would make all the tortfeasors contribute, while the courts of common law would enforce the whole claim against any one of the wrong-doers, and would enforce no contribution. In this state of things, the common law courts assumed and secured jurisdiction over what they call transitory actions, by resorting to a fiction, that is, by alleging, contrary to the fact, that the action arose in the county where the venue was laid, and the plaintiff sought to have the cause tried, and thus took cognizance of causes actually arising within the jurisdiction of the Admiral; and as the common law courts lent themselves to this aggression, and there was no power in the realm to prohibit them, this became the settled law of the land, but as the Admiral was under the control of these same courts, who, if he attempted to exercise any jurisdiction within the limits of their own jurisdiction, could prohibit and exclude him from it, and although judges of the Admiralty have from time to time claimed jurisdiction where the tides ebb and flow, even within the bodies of the counties, yet they were never allowed to exercise it, and that they could not exercise such power has been the settled law in England for a great number of years, down to the passing of the Admiralty Act in 1861.

In 1852 the late Robert L. Hazen, the then judge of our

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 TEDDINGTON Vice-Admiralty Court, in the case of the *Boadicea*, the cause being for a collision near Partridge Island, in the harbor of St. John, and within the body of the city and county of St. John, in a most elaborate and well reasoned judgment, decided the Vice-Admiralty Court of New Brunswick had no jurisdiction. In this conclusion I entirely concur. I therefore agree with Mr. Kerr, the respondents' counsel, that such Court had no jurisdiction previous to the passing of the Vice-Admiralty Act of 1863. Then the sole question in the case is, does that act give the Court jurisdiction in this case? I think it does. I am aware that such construction will give such Court such jurisdiction concurrently with the Common Law Courts, and that in consequence the rights of parties will in many cases vary according to the Court in which the litigation takes place, but I think this is a consideration for parliament and not for a judge. I admit it must be shown that parliament has given such jurisdiction by plain words. The rule is that a distinct and unequivocal enactment is required for the purpose of adding to or taking from the jurisdiction of a superior court of law. Thus, in *Smith v. Brown* (1), the Court say: "It seems to us impossible to suppose that the legislature can have intended by a side wind to effect so material a change in the position of the parties concerned." See also *Attorney General v. Sillem* (2), and *Cousins v. Lombard Bank* (3). Then, has parliament given such jurisdiction in plain language by the Vice-Admiralty Act of 1863? The preamble declares that one of the objects of the Act was to enlarge the jurisdiction of the Court. Of course that might be done by adding to the number of matters of which it was authorized to take cognizance, without extending the jurisdiction territorially; but it is clear that the Act does extend the jurisdiction territorially, for it gives jurisdiction over claims that must arise in other places than on the high seas, such as claims for repairs and disbursements, and also for the possession of ships, the latter resting on title which can only be acquired by declaration of ownership and registry in the body of

(1) L. R. 6 Q. B. 729.

(2) 10 H. L. 704.

(3) L. R. 1 Ex. D. 406.

some county. Bearing all this in mind, look at the words of the Act itself. Section 10 enacts as follows: The matters in respect to which the Vice-Admiralty Courts shall have jurisdiction are *inter alia* as follows: Sub-sec. 5—*Claims for damage done by any ship.* It follows that if what is claimed for in this action is damage done by a ship, parliament has declared that the Vice-Admiralty Court shall have jurisdiction, and if parliament has said so, I cannot say otherwise. If that is all that is necessary to give jurisdiction, it can be of no importance in what place that damage was done, or what other Courts have jurisdiction over the same cause. It is not damage done to a ship or other marine matter or thing, but damage done by a ship; and it would not be less damage done by a ship if the damage was done by a ship to a house or railway car, or other personal property, than if done to another ship.

Then all that remains to be ascertained to give the jurisdiction is whether what was done to the railway car was done by the ship libelled. The promovent says that he is prepared to prove that it was. The respondents' protest alleges that it was done with the ship's hawser or lines by the movements of the ship. It appears to me, if so done, it was done by the ship. The momentum that caused the injury proceeded from the ship herself. I say nothing as to who was to blame or as to whether the promovent will be entitled to recover. I have nothing to do with that. It will be the duty of the worshipful judge of the Vice-Admiralty Court to decide that question. The word damage would appear to include damage done to any property at least, and that it did is admitted in *Smith v. Brown*, although in that case it was held that it did not include injury to a person, but the subsequent cases decide that the meaning of this word cannot be so limited, and there are many cases under the Admiralty Act of 1861 in which the words are the same, damage done by any ship—which decides that injury to any property is covered by the enactment, and although much that was said in *ex cargo Argos* (1) can be said in this case, if the hardship of having a different rule

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(1) L. R. 5 P. C. 134.

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of law to govern a case in which the parties have a remedy in the ordinary courts of the country, and that parties should be compelled to have their rights tried by the antiquated, cumbersome and expensive mode of procedure of the Vice-Admiralty Court, and that there should be no appeal from a single judge but to the expensive and distant court of the Judicial Committee of the Privy Council in England, yet I think I am forced to say, as was said by the Court in the case referred to, that if this was really the intention of the legislature, however it may be regretted by those who value the symmetry, consistency and convenience of legal procedure, the legislature has certainly used apt, precise and unambiguous words to define the new causes that they meant to add to those already within the jurisdiction of that Court. And I find myself unable to affirm that the legislature did not mean what it has plainly said, and as a judge I have nothing to do with the justice or injustice, the convenience or inconvenience, occasioned by it. If there is such, it is the duty of parliament to remedy it and not that of the learned judge of the Vice-Admiralty Court or myself. For these reasons I must refuse the application.

Rule nisi for prohibition refused.

The Court of Admiralty in England is of great antiquity. Mr. Justice Story, in his celebrated judgment in *De Lovio v. Boit*, 2 Gall. 398, s. c., Meyer's Federal Decisions, vol. 23, p. 19, delivered in 1815, says: "What was originally the nature and extent of the jurisdiction of the Admiralty, cannot now with absolute certainty be known. It is involved in the same obscurity which rests on the original jurisdiction of the Courts of Common Law. It seems, however, that at

a very early period the Admiralty had cognizance of all questions of prize; of torts and offences, as well in ports, within the ebb and flow of the tide, as upon the high seas; of maritime contracts and navigation; and also the peculiar custody of the rights, prerogatives and authorities of the Crown in British seas. The forms of its proceedings were borrowed from the civil law."

When Dr. Lewis was judge of the Court, over three centuries ago, three ancient MS. volumes

on vellum were in the registry of the Court, and in these volumes were contained the rules and ordinances governing the practice and procedure of the Admiralty. By some means the one containing the ancient ordinances of the Admiralty came into the possession of Selden, and was by him presented to the Bodleian Library at Oxford, where it may now be found. One, of a very ancient character, "has never wandered away from the archives of the High Court;" but the third, known as the Black Book of the Admiralty, was lost for three quarters of a century or more. It has lately been found. Sir Travers Twiss, in the introduction to vol. 1 of his edition of the Black Book, written in 1871, laments the loss of the original volume. Three years later, in the introduction to vol. 3 of the same work, he gratefully announces its discovery. The edition of the Black Book by Twiss contains not only the ancient rules and ordinances of the Admiralty, but the laws of Oleron and other ancient maritime codes.

The Court originally was held before the Lord High Admiral, or his deputy, and possessed a two-fold character. The *instance* court took cognizance of all contracts made, and injuries committed on the high seas; the *prize* court had jurisdiction of prizes taken in time of war. The judge

of the Admiralty, when there was a Lord High Admiral, held his patent from him, but from the time the Duke of York ceased to be High Admiral, the judges have held their commissions directly from the Crown. The badge of the Admiralty is the anchor and twisted cable. "The Silver Oar of the High Court of Admiralty of England is the ensign of its authority to arrest both persons and vessels on the high seas. It is kept in the custody of the marshal of the High Court, and is placed on the table before the Judge of the High Court when he sits in judgment. Of its origin as an ensign of authority, nothing is known for certain, but there is little doubt that the Silver Oar of the High Court is of greater antiquity than is generally supposed. Whilst there are some grounds for believing that certain portions of it are Edwardian, and so far may be coeval with the institution of the office itself of the High Admiral of England, the Silver Oar of the High Court may be thus described: Its entire length is about two feet nine inches; the lower part of it, or what would be termed by mariners the "loam," consists of a stem one foot nine inches long, divided into three compartments by knobs or rings, from the upper side of which an oar blade extends, about a foot in length, shaped like a paddle or

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ancient steering oar, and having various emblems embossed on its face." (From an article by Sir Travers Twiss, D. C. L., Q. C., on "The Jurisdiction of the Silver Oar of the Admiralty," in the *Nautical Magazine*, vol. 46, p. 572, A. D. 1877). The common law judges were ever ready to limit the jurisdiction of the Court and to deny its original powers. Hale says: "The jurisdiction of the Admiralty Court, as to the matter of it, is confined by the laws of the realm to things *done upon the sea only*; as depredations and piracies upon the high sea; offences of masters and mariners upon the high sea; maritime contracts made and to be executed upon the high sea; matters of prize or reprisal upon the high sea. But touching contracts or things made within the bodies of English counties, or upon the land beyond the sea, though the execution thereof be in some measure upon the high sea, as charter parties, or contracts made even upon high sea, touching things that are not in their own nature maritime, as a bond or contract for the payment of money; so also of damages in navigable rivers, within the bodies of counties, things done upon the shore at low water, wreck of the sea, etc. These things belong not to the admiral's jurisdiction, and thus the common law and the statutes of 13 Rich. 2, cap. 5, 15 Rich.

2, cap. 3, confine and limit their jurisdiction to matters maritime, and such only as are done upon the high sea." Hale's *Com. Law* (4th ed., 1792), p. 31. This writer also contends that the original jurisdiction of the admiralty was either by the connivance or permission of the common law courts, and that the statutes of Rich. 2 and Hen. 4 were only in affirmance of the common law, and to limit the power which the admiralty had gotten from the laws of Oleron. The Courts of Common Law, by means of prohibitions, gradually denuded this court of much of its ancient jurisdiction, so that it at length came to be considered necessary that contracts to be cognizable in the Admiralty must be made upon the sea. By the statute 13, Rich. II, c. 5, it is enacted "that the Admirals, and their deputies, shall not meddle henceforth of anything done within the realm, but only of a thing *done upon the sea*, according as it hath been duly used in the time of the noble King Edward, grandfather of our lord the king that now is." This refers to Edward the Third.

In the time of Richard II the realm consisted of the land within the bodies of the counties. All beyond low water mark was part of the high seas. At that period the three mile radius was not thought of; per Lush., J.,

in *Reg. v. Keyn*, 2 Ex. D., p. 239. The jurisdiction the Cinque Ports exercised under their charters in relation to the sea shore extended to low water mark, "and as far beyond that mark as a horseman could ride into the sea and touch any object with the point of a spear." Sir Travers Twiss thinks we may discern in this ancient rule "the outlines of the principle which has been applied in modern times in limitation of the extent of sea over which a neutral State may claim to exercise a qualified jurisdiction in time of war, namely, '*ibi potestatem finire, ubi finitur armorum vis.*'"

Two years subsequently, by the statute 15 Rich. 2, c. 3, it was enacted "that all manner of contracts, pleas, quereles (complaints or controversies), and of all other things done or arising within the bodies of counties, as well by land as by water, and also of wreck of the sea, the Admiral's Court shall have no manner of cognizance, power or jurisdiction; but all such manner of contracts, pleas and quereles, and all other things rising within the bodies of counties, as well by land as by water, as afore, and also wreck of the sea, shall be tried, determined, discussed and remedied by the Court of the land, and not before or by the admiral nor his lieutenant in any wise. Nevertheless, if the death of a man,

and of a maihem done in great ships, being hovering in the main stream of great rivers only, beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers, the admiral shall have cognizance; and also to arrest ships in the great flotes for the great voyages of the king and of the realm, saving always to the king all manner of forfeiture and profits thereof coming; and he shall also have jurisdiction upon the said flotes during the said voyages, only saving always to the lords, cities, and boroughs, their liberties and franchises."

The first of these statutes was confirmed by 2 Hen. 4, c. 11, and it was "upon these statutes that the controversies respecting the Admiralty were so zealously and obstinately maintained during more than two centuries." Mr. Justice Story, in the judgment above noted, says: "In the construction of these statutes the Admiralty has uniformly, and without hesitation, maintained that they never were intended to abridge or restrain the rightful jurisdiction of that Court; that they meant to take away any pretense of entertaining suits upon contracts arising wholly upon land, and referring solely to terrene affairs; and upon torts or injuries which, though arising in ports, were not done within the ebb and flow of the tide; and that the language of

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these statutes, as well as the manifest object thereof, as stated in the preambles, and in the petitions on which they were founded, is fully satisfied by this exposition. So that consistently with these Statutes the Admiralty may still exercise jurisdiction: 1. over torts and injuries upon the high seas and in ports within the ebb and flow of the tide, and in great streams below the first bridge; 2. over all maritime contracts arising at home or abroad; 3. over matters of prize and its incidents." For an able judgment opposed to the extended jurisdiction claimed by Story, J., see *Ramsay v. Allegre*, 12 Wheat., 611, per Johnson, J. In 1575 an agreement was entered into between the judges of the King's Bench and the Court of Admiralty as to the limits of jurisdiction to be observed; and still later, in 1632, certain resolutions were entered into by all the Privy Council, and subscribed by all the judges of England, for the purpose of establishing and limiting said jurisdiction. These resolutions, which may be found in Browne, Civ. and Ad. Law (1st Am. from 2 Eng. Ed., 1840), vol. 2, p. 78, are as follows:—

"If suit should be commenced in the court of admiralty upon contracts made, or other things personal, done beyond the seas, or upon the sea, no prohibition to be awarded.

"If suit be before the admiral

for freight, or mariners' wages, or for breach of charter-parties, for voyages to be made beyond the seas; though the charter-party happen to be made within the realm, so as the penalty be not demanded, a prohibition is not to be granted: but if the suit be for the penalty; or if the question be, whether the charter-party were made or not, or whether the plaintiff did release or otherwise discharge the same within the realm; this is to be tried in the king's courts at Westminster, and not in his court of admiralty.

"If suit be in the court of admiralty for building, amending, saving, or necessary victualling of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself a party, no prohibition is to be granted, though this be done within the realm.

"Although of some of those causes arising upon the Thames beneath the first bridge, and divers other rivers beneath the first bridge, the king's courts have cognizance; yet the admiralty has jurisdiction there, in the points specially mentioned in the statute of 15 Richard II. And also, by exposition of equity thereof, he may enquire and redress all annoyances and obstructions in these rivers, that are any impediment to navigation or passage to or from the

sea; and also may try personal contracts, or injuries done there, which concern navigation upon sea. And no prohibition is to be granted in such cases.

"If any be imprisoned, and upon habeas corpus brought—if it be certified that if any of these be the cause of his imprisonment, the party shall be remanded."

Formerly, appeals from Admiralty or Vice-Admiralty Courts abroad were made to the High Court of Admiralty, but by 3 & 4 Wm. IV. c. 41, sec. 2, such appeals were directed to be made to the Privy Council. See *The Peerless*, Lush. p. 40, *Macpherson*, Prac. Jud. Com. 156. Previously to 1840, the Court of Admiralty had no jurisdiction in the case of contracts made on land or in the body of a county. See *The Westrup v. Great Yarmouth Steam Carrying Co.*, 43 Ch. D. p. 241. For a very interesting case on maritime jurisdiction see *Reg. v. Keyn*, 2 Ex. D. 63. The Court at present does not have jurisdiction to entertain a suit against a pilot for negligence in causing a collision between two vessels on the high seas. *Reg. v. The Judge of the City of London Court* (1892), 1 Q. B. 273. This is an important case as, in it Lord

Esher, M. R. reviews and dissents from the views of Story J. in *DeLovio v. Boit*, *supra*. The enlarged jurisdiction given to the High Court in 1840, was still further enlarged by the Act of 1861. By sec. 14 of the Act of 1861, the Court was made a Court of Record, which status the Courts of Common Law had previously refused to recognize. And in *The Pieve Superiore*, L. R. 5 P. C. 482, it was held as the latter Act was intended to remedy a grievance by amplifying the jurisdiction, it ought to be construed liberally so as to afford the utmost relief which the fair meaning of its language will allow. Enlarged jurisdiction was given to Vice-Admiralty Courts by the Act of 1863, and the same rule of construction will apply to that Act. The latter Act has been repealed by the Colonial Courts of Admiralty Act, 1890, 53 & 54 Vict., c. 27, and this has been adopted and acted on in Canada by the Admiralty Act, 1891, 54 & 55 Vict., c. 29, so that the laws relating to the jurisdiction of the High Court of Admiralty in England, including the Imperial Statute, 24 Vict., c. 10, are now in force in Canada, with a few immaterial exceptions.

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TEDDINGTON

1882

Nov. 29.

THE ARKLOW (1).—PTE.

Collision—Sailing Rules—Lights—Departure from—Liability for.

The A. and the B. came into collision on the high seas. The B. was close-hauled on her starboard tack, the A. on her port tack, running free. It was not shown that the lights of the B. were so placed as to be fairly visible to the A. Both vessels kept their courses, and the collision took place.

Held:—Notwithstanding the lights of the B. were not fairly visible to the A., it was the duty of the latter to keep clear and give way, and not doing so, she was liable for the damages.

This case was tried with Captains Prichard and Thomas as nautical assessors to the Court. The facts of the case sufficiently appear from the summing up to the assessors, and the judgment of the Court.

W. H. Tuck, Q. C., and *James Straton*, for promovents.

C. W. Weldon, Q. C., for respondents.

WATTERS, J., summing up to the nautical assessors, said:

Collisions may occur without blame being imputable to either party, as by a storm, or any other *vis major*, in which case the misfortune must be borne by the party upon whom it happens to fall, the other not being responsible.

The misfortune may arise where both parties are to blame, where there has been a want of due care, diligence and skill on both sides; in such a case the rule is that the loss must be apportioned between them; or, it may happen by the misconduct of the suffering party only, in which case he must bear his own burden; or, it may have been the fault of the ship complained of, when the injured party would be entitled to an entire compensation from the other.

In cases of collision, the law requires that there should be preponderating evidence to fix the loss on the party charged, before the Court can adjudge him to make compensation.

(1) In this case the respondent asserted an appeal to the Privy Council, and the judgment was reversed. 9 App. Cas. 136. See next case for judgment on appeal.

The promovent or plaintiff must prove not only negligence on the part of the respondent, but that he himself has not been guilty of any act whereby the damage has been caused.

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In this case, the barque Bunin, which is the promovent, charges that she being on the high seas on 30th March, 1881, on a voyage from Havre to Baltimore, at 2 a. m., having her red and green lights, properly fitted and brightly burning, being on a starboard tack, close hauled, steering south-west one-quarter half west, the wind about north-west, she observed the red light of the barque Arklow on her port tack, steering in an easterly direction, running free; that when within one-quarter of a mile of the Arklow, seeing danger of collision, she sounded a bell, of which the Arklow took no notice, but that the Arklow continued on her course, and ran into the Bunin, striking her on the starboard side, by which the Bunin was so much damaged that she was abandoned as unseaworthy in two days after.

The defence on the part of the Arklow is that the Bunin exhibited no light; that the night was dark, and that when the Bunin was first sighted it was impossible for the watch on the Arklow to discern how she was heading. That the Arklow was steering E. by S., with wind about N. That about 1.30 a. m., it being the mate's watch, he observed a dark object a point and a half on the weather or port bow, but could not make out how it was heading. That by the aid of glasses he made it out to be a vessel, but he could see no lights, and he concluded its course was westerly. That the vessel, which proved to be the Bunin, approached until the sounding of a bell and shouting could be heard on board of her. The mate says he then called the captain, but that the Bunin was bearing down upon them when he ordered the helm to be put hard a port and aft sails hauled down, which he says was done; but that almost immediately the Bunin struck the Arklow across the port bow, carrying away everything forward.

The parties differ materially on the most important question, namely, that of the lights. They differ also somewhat as to the direction of the wind, and on the conduct of the Bunin immediately before the collision. I must rely upon

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your nautical knowledge and judgment to discover which statements are the most credible.

The Admiralty regulations made for preventing collisions, by which both of these ships are bound, are clear and explicit on the subject both of lights and steering. The following are the regulations as to lights, Article 3, sections *b*, *c* and *d*:

(*b*) On the starboard side, a green light so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(*c*) On the port side, a red light, so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(*d*) The said green and red side lights shall be fitted with in-board screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

The steering and sailing rules applicable to this case are Articles 14 and 22:

ART. 14. When two sailing ships are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, viz.:

(*a*) A ship which is running free shall keep out of the way of a ship which is close-hauled.

(*b*) A ship which is close-hauled on the port tack shall keep out of the way of a ship which is close-hauled on the starboard tack.

(*c*) When both are running free, with the wind on different sides, the ship which has the wind on the port side shall keep out of the way of the other.

(*d*) When both are running free, with the wind on the same side, the ship which is to windward shall keep out of the way of the ship which is to leeward.

ART. 22. Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course.

As to the lights on the Bunin, I ask your opinion whether the Bunin carried the colored lights fixed so that they could be fairly visible to the Arklow?

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On the part of the Bunin, the evidence of the master, the steward, and indeed all the crew, whose affidavits have been read, swore positively that these lights were brightly burning and in proper position. On the other side, the captain, mate, and his watch on the Arklow, positively deny having seen any such lights. (Read affidavit of mate of Arklow.)

In a case of this kind, when the evidence is conflicting and nicely balanced, a Court will be guided by the probabilities of the respective cases, and a presumption would be that the master of a vessel would do that which is enjoined upon him by the regulations, and that he would follow the regular and correct course of navigation (1).

Both sides agree that the night, although dark, was clear and the sea smooth, and that a light could be seen a considerable distance.

You will give me your opinion whether the Bunin had or had not omitted the necessary duty of having her lights so placed that they could be fairly visible, and if you are of opinion that she had not omitted that necessary duty. I ask you to say whether the Arklow, supposing she had kept an effective and good lookout, ought not to have seen these lights?

Next: If you should be of opinion that no proper lights were exhibited by the Bunin, I will ask you whether the absence of such lights contributed to the collision by preventing the Arklow from desecring the Bunin at an earlier period, and did it thus contribute to the collision? In other words, if the Bunin's lights had been properly exhibited, thereby giving warning to the Arklow of the course of the Bunin, and enabling the Arklow to take measures by which the collision would probably have been avoided?

As it is settled law in these cases, that the omission to exhibit proper lights can only be held immaterial when it clearly appears that the absence of such lights did not cause the collision, therefore, supposing that the Bunin did not

(1) Lowndes on Coll. 87, 215.

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If the Bunin was made out by the Arklow as an approaching vessel at the distance of one-quarter of a mile, I ask your opinion whether the Arklow running free might not have avoided the collision?

I do not say that the Arklow, immediately upon sighting the object which proved to be the Bunin, should have changed her course or adopted any particular course. If the Bunin was first seen in the manner described by the mate of the Arklow, a reasonable time may have been necessary for him to determine what course ought to be pursued, but so soon as he discovered it was an approaching vessel his duty then became imperative to obey the regulations and promptly adopt the proper means to keep out of her way.

I therefore ask you had the Arklow, after she discovered that the Bunin was approaching her, time and opportunity to have avoided her?

The Arklow having the wind free, and the Bunin being on the starboard tack, it was the duty of the Arklow to have avoided her, providing she had time and opportunity to do so (1).

It is alleged by the Arklow that, immediately before the collision, the Bunin changed her course by starboarding her helm, and thereby caused the collision. I ask your opinion whether this took place?

It is evident these two vessels, when seen, were approaching each other, and the question to be decided under the evidence and the Admiralty regulations is, which of the two ought to have kept the wind, and which ought to have given way.

WATTERS, J., on returning from consultation with the nautical assessors:

The ship-masters are of opinion that the fault lay wholly

(1) Lowndes, 214.

with the Arklow; that notwithstanding the evidence is conflicting as to whether the lights of the Bunin were fairly visible to the Arklow, they are of opinion that the Arklow, which was running free, made out that the Bunin was an approaching vessel, on the starboard tack, in ample time to have taken means to have avoided her, by giving way to the Bunin, which she was bound to do, but that she kept on her course until the danger became too imminent, and until it was too late to avoid the collision; and also that the inability of the Arklow to see the Bunin's lights was not the cause of the collision. I concur in this view. I consider this point left in so much doubt by the conflict of evidence, that I am of opinion the lights of the Bunin were not fairly visible to the Arklow, but I agree with the assessors that the omission to show lights is immaterial, as it clearly appears that the absence of lights did not cause the collision. I therefore pronounce for the damages \$24,000, and costs.

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Decree accordingly.

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Nov. 20, 21.

[PRIVY COUNCIL.]

EMERY AND OTHERS, APPELLANTS;

AND

CICHERO, RESPONDENT.

THE ARKLOW (1).

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF NEW
BRUNSWICK.*Collision—Negligence by Complaining Vessel.*

Where there has been a departure from an important rule of navigation, if the absence of due observance of the rule can by any possibility have contributed to the accident, then the party in default cannot be excused.

Where the lights of the complaining vessel were not properly burning, and were not visible on board the other vessel,

Held:—That in the absence of proof that this latter was also to blame, the suit must be dismissed.

Appeal from a decree of the Vice-Admiralty Court of New Brunswick (Nov. 29, 1882), condemning the Arklow in \$24,000 damages and in costs.

The facts of the case appear in the judgment of their lordships.

Myburgh, Q. C., and *Beaufort*, for the appellants.

Hall, Q. C., and *Bucknill*, for the respondent.

The judgment of their lordships was delivered by

SIR JAMES HANNEN. The case presented on behalf of the Bunin, the complaining vessel below, was as follows: That on the 30th of March, 1881, as she was proceeding on a voyage from Havre to Baltimore, at 2 o'clock in the morning, the weather being dark but clear, and the wind from

(1) See *Ante*, p. 66. This case is reported in 9 App. Cas. 136. The decree appealed from was made by the Vice-Admiralty Court of New Brunswick, November 29, 1882, and not in 1881, as erroneously stated in the report of the case on appeal.

the north-west, she was steering a course south-west by west half west, close hauled on the starboard tack; that her lights were properly burning; and that she was proceeding at the rate of six and a half knots an hour, when the red light of a ship, which proved to be the Arklow, was seen on the starboard bow. That she, the Bunin, kept her course; but that the Arklow, by some unaccountable mismanagement, as it is stated, ran into the Bunin, striking her about the fore rigging, on the starboard side, with her stern.

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On the other hand, for the Arklow it was alleged that she was steering a course east by south half-south, the wind being in the north, when a vessel was seen a point and a half on her port bow showing no lights whatever; that she was thought to be going the same way as the Arklow, but that, after examination through the glass, and watching her for some appreciable time, it was discovered that she was approaching the Arklow under a starboard helm; that then the Arklow's helm was put hard aport and her after sails taken off.

In confirmation of the statement that there were no lights visible upon the Bunin, it is alleged and stated by several witnesses that a green light was seen moving upon the Bunin just before the collision; and in confirmation of the statement that the Bunin did not keep her course, but approached under a starboard helm, it is stated that her spanker jibed from port to starboard—it is said, indeed, just before the collision.

Now, in the circumstances alleged on the one side and on the other, it was undoubtedly the duty of the Bunin to keep her course, and it was primarily the duty of the Arklow to keep clear; but the Arklow alleges, by way of excusing herself for not having kept clear, that there was no light visible on the Bunin, and that it was therefore impossible to know in what direction she was sailing, and therefore impossible to take measures for the purpose of preventing the collision with her.

The first question of importance in the case is whether or not the lights of the Bunin were burning for any serviceable purpose. On this point the learned judge in the Court

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below, after consulting the assessors, says: "I consider the point whether the Bunin carried proper lights left in so much doubt by the conflict of evidence, that I am of opinion that the lights of the Bunin were not fairly visible to the Arklow;" and then he goes on to deal with the case upon that footing. The peculiar language which is used by the learned judge about their not being fairly visible, may possibly have reference to the evidence which has been given that a green light was seen, not in its proper place, but moving on the Bunin, immediately before the collision. Their lordships agree in the view which was taken by the learned judge below, upon this point, that the lights of the Bunin were not in such a position as to be visible to those on board the Arklow, and that those on board the Bunin are responsible for that departure from the proper rules of navigation.

Their lordships arrive at this conclusion upon an examination of the evidence on the one side and on the other. It is very much to be regretted that the Court below was obliged to rely solely upon affidavits which, from their language and general contents, it is pretty plain were drawn by somebody with a view to the supposed facts of the case, and were then laid before the witnesses for the purpose of getting their evidence, and leaving them as it were, to take exception to anything which they found in those statements. Thus, all the witnesses but one, on behalf of the Bunin, say, in general terms, that lights were burning according to the regulation, but there is only one of them who speaks to the fact of his having actually seen that the lights were burning at the time of the collision, and that is the witness Lazzarini, whose duty it appears to have been to light and trim the lamps, which he says he had done at 8 o'clock. He does, indeed, say that when he was called on deck by hearing that something wrong had happened he did see that the lights were burning. On the other hand, the witnesses for the Arklow all agree that there was no light visible on the Bunin; and they make that statement with certain particularity which impresses their lordships in favor of their statements as against the general statements, with

the exception mentioned, of those on board the Bunin. For instance, it is stated that the vessel, having been reported by the lookout man, and the mate and another of the crew who was with him having seen the vessel looming in the distance, the mate fetched the captain's glasses for the purpose of examining it more carefully. That is a particularity which cannot be disregarded, except on the supposition that the mate and the witness who confirms him are deliberately stating that which they must know to be false, and going much further than a mere assertion that they were doing their duty. In addition to that, there are several witnesses who say that they saw a green light moving on the vessel immediately before the collision, as though the green light had, either for the purpose of being trimmed or from some other accident, not been in its place, but that when the vessel was found to be approaching another the green light was being moved from one place to another.

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Their lordships, therefore, come to the conclusion that the lights of the Bunin were not properly burning. But the learned judge below says that this question of the lights is immaterial when it appears that their absence did not cause the collision. On this part of the case their lordships are unable to concur with the judgment of the learned judge below. The principle in cases of this kind, where there has been a departure from an important rule of navigation, is this, that if the absence of due observance of the rule can by any possibility have contributed to the accident, then that the party in default cannot be excused. On this point their lordships can entertain no doubt that the absence of proper lights must have occasioned an entire change in the course of events which followed upon the Bunin being visible to the Arklow. Without those lights the statement made by the witnesses on board the Arklow commends itself at once to credence that they did not know in what direction this vessel was going, and that it took an appreciable time before a judgment could be formed upon that subject, during the whole of which time it must have remained a matter of pure chance whether it would be right to take one manœuvre or another. Their lordships are

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therefore of opinion that the Bunin was clearly to blame, and that she was to blame in a matter which makes her responsible.

The only question that remains, therefore, is whether or not it has been shown that the Arklow was also to blame. It lies on the Bunin, which is shown to have been in default, to establish, to the satisfaction of the tribunal that has to determine it, that the Arklow was in fault. Now, on this part of the case it is to be observed that the time which has to be dealt with is very short. The vessels were approaching at a speed which would bring them together at the rate of a mile in five minutes. Reference has been made to the marginal note upon the diagram furnished by the Arklow, in which it is said that when first seen the Bunin was about six cables' distance, which would be a distance of twelve hundred yards. One of the witnesses for the Arklow says that the Bunin was seen about four minutes before the collision. It is obvious that these statements as to time and distance cannot be dealt with as exact computations, but only indicate the rough conjectures which the witnesses were able to make at the time. But it is obvious that some space of time must have been occupied in fetching the glasses, which would diminish the period of time with which we are dealing. Secondly, it is stated, and no reason to doubt it is suggested, that the helm of the Arklow had been ported before the collision; that is to say, that a step had been taken for the purpose of avoiding the approaching danger; and Nilson, one of the witnesses, says that the Arklow had under her port helm come round two points, and that this had been done when it was seen that the Bunin was approaching under a starboard helm. It is clear, therefore, that we have but a very short space of time indeed during which the hesitation on the part of those on the Arklow was manifested as to what course they should take. Considering the difficulty occasioned by the absence of lights on board the Bunin, which prevented the possibility of seeing what course she was steering, their lordships are of opinion that it has not been established that there was negligence on the part of those on board the Arklow in not

sooner porting the helm, as it is clear she had to some extent done before the collision.

Another point has been discussed, which was not dealt with in the Court below, and that is whether or not the Bunin kept her course. Her witnesses allege that she did keep her course. On the part of the Arklow it is alleged that she came round under a starboard helm, and so came down upon the Arklow. In support of this statement it is alleged that she jibed; and it has been argued that credence ought not to be given to that statement because it is said the Arklow had gone off only to the extent of half a point, while it is represented that the Bunin had got round a great number of points—the exact number it is not necessary to specify, but so as to bring her head pointing south before it would be possible that she would jibe. It is to be observed, however, that the two periods of time that were referred to by Mr. Hall are not properly to be compared, because the evidence on the part of the Arklow is that it was discovered that the Bunin was, to use the expression of the witnesses, coming down upon them under a starboard helm, and that it was apparently which showed the direction which the Bunin was taking, and it was then, after that had been seen, that the helm of the Arklow was ported. There was, therefore, some time before the porting of the helm during which the starboarding of the helm of the Bunin had taken place. But, further than this, it is to be observed that where a collision of this kind occurs the exact succession or concurrence of events is not accurately noted by the witnesses, and it may well be that the jibing of the spanker, which is referred to by the witnesses as taking place immediately before the collision, may in fact have taken place at the time of the collision, and in consequence of the collision by the head of the Bunin being driven sharply round.

On the whole, their lordships are of opinion that it has been established that the Bunin was to blame, and that it has not been established that the Arklow was to blame; and their lordships will, therefore, humbly advise Her Majesty that the decision of the Court below should be reversed, with costs.

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In *The Fanny M. Carvell*, 13 App. Cas. 455, n., it was held that by the true construction of the Merchant Shipping Act, 1873, s. 17, a British ship cannot be pronounced in fault merely by reason of its non-observance of a maritime regulation. In case of collision, a presumption of culpability thence arises, but such presumption may be met by proof that this infringement could not by any possibility have contributed to the collision. Where, therefore, a vessel infringed Art. 3 of the sailing regulations by carrying her sidelights with screens shorter than the length prescribed, but it was proved that such breach could not possibly have contributed to the collision, it was held that the ship so infringing could not be deemed to be in fault. In a late case it was proved that the lights carried by one of the vessels were so fixed as to be partially obscured, and that there was therefore an infringement of Art.

6 of the regulations. It was held by Butt, J., under s. 17 of 36 & 37 Vict., c. 85, that the vessel whose lights were thus obscured must be held in fault, without any inquiry as to whether such infringement could possibly have been a cause of the collision. This decision was reversed by the Court of Appeal, which held that it was the duty of the Court to inquire into the facts in order to ascertain whether the infringement of the regulations could possibly have contributed to the collision, and as it appeared from inquiry into the relative positions of the two vessels that the obscuration of the lights could not possibly have caused the collision, the vessel carrying such lights was not to blame. *The Duke of Buccleuch*, 15 P. D. 86. On appeal to the House of Lords the Court divided evenly, thereby affirming the judgment of the Court of Appeal, *ibid* (1891), A. C. 310.

THE JONATHAN WEIR.

1883

Oct. 8.

Wages—Jurisdiction—Amount claimed.

The master of a vessel registered in Canada, being also a part owner, was discharged at the home port, where the other owners also resided. He caused the vessel to be arrested in a cause of subtraction of wages for an amount under \$200.

Held :—That the Court had no jurisdiction under 36 Vic. c. 129, s. 56, and the cause was dismissed with costs.

The promovent in this cause instituted an action for the recovery of \$52, or thereabouts, for balance of wages due him as master of the ship Jonathan Weir, and also in the further sum of \$7 for disbursements. The vessel was arrested in a cause of subtraction of wages, and released on bail. The owners appeared under protest, objecting to the jurisdiction of the Court on the ground that the amount claimed was under \$200. The vessel was a Canadian ship, registered at the port of Moncton, in New Brunswick. It also appeared by the act on protest that the promovent, before suit brought, had made no demand for payment; that the owners were not insolvent; that the vessel was not at the time under arrest in any other cause in the Court; that all the parties in interest resided within twenty miles of the place where promovent was discharged, and that promovent was discharged at the home port of the said ship.

C. W. Weldon, Q. C., in support of the act on protest to the jurisdiction, submitted that the only question for determination is whether an action can be maintained for the recovery of wages where the amount claimed is under \$200. The Merchant Shipping Act, 1854, sec. 189, limits the right to £50; the Canadian Act, 1873, c. 129, sec. 56, to \$200. He further cited the tug *Robb* (1); the Admiralty Act, 1861; the Vice-Admiralty Act, 1863; *Burns v. Chapman* (2); *Rossi v. Grant* (3); *Johnston v. Hilberry* (4). Want of

(1) 17 Can. L. J. 66.

(2) 5 C. B. N. S. 481.

(3) *Ibid.* 699.

(4) 3 H. & C. 328.

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jurisdiction is a plea in bar, and must be so pleaded. *The Harriett* (1).

C. A. Palmer, contra, contended that the promovent, being master and part owner, must be deemed an exception to the parties intended by the statutes cited. He referred to *The Royal* (2); *Maude & P.*, 123, 124; *The Ferret* (3); *The Feronia* (4); *The City of Mobile* (5). The Admiralty Act, 1861, was a virtual repeal of sec. 189 of the Act of 1854. The Vice-Admiralty Court, from 1854 to 1863, had not jurisdiction to entertain a suit under £50, but the Vice-Admiralty Act, 1863, repealed that limitation. See also *Brown v. Vaughan* (6). The Parliament of Canada cannot repeal an Imperial statute, and therefore the Vice-Admiralty Act, 1863, is not modified by sec. 56 of the Canadian Act of 1873.

Weldon, Q. C., in reply. The Dominion Parliament has authority to modify the terms of the Imperial Acts of 1854 and 1863 so far as proceedings against Canadian shipping are concerned. The Acts of 1854 and 1863 are not repugnant. The latter Act does not impliedly repeal sec. 189 of the Act of 1854. As to promovent being a part owner, the Court cannot import any exception into the Imperial statute.

WATTERS, J. Held that sec. 56 of c. 129 of the Canadian Act of 1873 was conclusive of the case that the Court had no jurisdiction; he sustained the act on protest, and dismissed the suit with costs.

Ordered accordingly.

A doubt has been expressed in some quarters as to the jurisdiction of the Admiralty Court in Canada to entertain a suit for seamen's wages where the amount claimed is under \$200. By the terms of the Merchant Ship-

ping Act, 1854, 17 & 18 Vict., c. 104, sec. 189, the right to sue in the High Court of Admiralty in England was limited to claims of £50, and upwards. No suit, under that Act, could be instituted in the English High Court for any

(1) 5 L. T. N. S. 210.

(2) Cook 326.

(3) 8 App. Cas. 329.

(4) L. R. 2 Ad. & E. 65.

(5) L. R. 4 Ad. & E. 191.

(6) 22 N. B. 258.

claim for wages under £50, "unless the owner of the ship is adjudged bankrupt, or declared insolvent, or unless the ship is under arrest or is sold by the authority of any such Court as aforesaid, or unless any justice, acting under the authority of this Act, refer the case to be adjudged by such Court, or unless neither the owner nor master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore." By the Admiralty Court Act, 1861, 24 Vic., c. 10, the High Court of Admiralty, under sec. 10, "shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship," whether the wages are earned under a special contract or otherwise, subject however to the proviso that if the plaintiff do not receive £50, he shall not be entitled to any costs unless the Judge shall certify that the case was a fit one to be tried in the said Court. The question then arises as to the effect of the Act of 1861. Has it by implication or necessary inference repealed section 189 of the Act of 1854? The opinion of the learned editors of Williams and Bruce on Admiralty Practice is that it has repealed section 189. At p. 202 (ed. 1886) it is stated: "The Court has now jurisdiction over a claim for wages, whatever may be its amount, but in order to

discourage the institution in the Court of suits for trivial amounts, it was provided by the 10th section of the Admiralty Court Act, 1861, that if the plaintiff in any such cause did not recover £50, he should not be entitled to any costs, charges or expenses incurred by him therein, unless the judge should certify that the cause was a fit one to be tried in the Court. This section is, however, now impliedly repealed, and the costs of an action are in the discretion of the Court." In a note on p. 203 of the same work it reads: "It is conceived that this section, by giving the Court jurisdiction over any claim for wages, etc., impliedly repealed the 189th section of the Merchant Shipping Act, 1854, so far as it restricted the jurisdiction of the Admiralty Court." The effect, however, became unimportant, as "owing to the operation of the County Court Admiralty Jurisdiction Act, 1868, it is no longer necessary to consider what the effect of the 189th section of the Merchant Shipping Act, 1854, had on the jurisdiction of the Admiralty Court." In a note to Roscoe's Ad. Prac. (ed. 1878), p. 86, it is said: "A suit for wages under £50 cannot be maintained in the Vice-Admiralty Court by sec. 189 of 17 & 18 Vic., c. 104; but the Act of 1863 contains no such limitation." The language of the Act of 1861, sec. 10, is sufficiently

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comprehensive to include "all claims" for seamen's wages, the object of the Act was to extend the jurisdiction of the Court, and it manifestly operates as a repeal of sec. 189 of the Act of 1854.

The cases of *Garnett v. Bradley*, 3 App. Cas. 944, (1878); and *Tennant v. Ellis*, 6 Q. B. D. 46, (1880), are cited in Williams & Br., in support of the contention that sec. 10 of the Act of 1861 has also been repealed so far as the question of costs is concerned. Both cases are important in showing how a subsequent Act may by implication repeal a prior enactment. The case of *Garnett v. Bradley* arose out of an action of slander, and under the Statute 21, Jas. I, c. 16, s. 6, where the plaintiff does not, in an action of slander, recover more than 40 shillings damages, he shall not get any greater amount of costs than the verdict for damages. The Judicature Act of 1875 authorises the Court to make rules, having the force of law, and in pursuance of that authority, Order 55 was passed, which, *inter alia*, declares that "the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court," subject, however, to the provisions of the Act, and that "costs shall follow the event," unless the judge shall otherwise order. In this case the judge did not otherwise order, and it was held that the

Statute of James was by implication repealed, and that plaintiff was entitled to his costs. To the same effect is the case of *Tennant v. Ellis*, 6 Q. B. D. 46, (1880). Lord Westbury in the *Westminster Estate, &c.*, 4 DeG. J. & S., p. 242, states the law of repeal by necessary implication thus: "If the particular Act itself gives a complete rule on the subject, the expression of that rule would amount to an exception of the subject matter of the rule." A case came before Dr. Lushington in March, 1861. *The Harriett*, Lush. 285, s. c., 5 L. T. N. S. 210, in which it was held that "the 189th section of the Merchant Shipping Act, 1854, bars a seaman from recovering wages less than £50 in the Court of Admiralty, except in the contingencies therein specified." It must be noted that *The Harriett* was decided on March 21, 1861, while the Admiralty Court Act, 1861, was not passed till May 17, 1861, and did not come into force till June 1, 1861. Dr. Lushington, in delivering judgment against the seaman's claim, on the ground that it did not amount to £50, said: "I am happy to say that an Act (24 Vict. c. 10) is now passing through the legislature, which will remedy the defect in the jurisdiction of the Court, which in the present case has operated with such hardship on the plaintiff." *The Harriett*, 5

L. T. N. S. at p. 212. This is a clear intimation on the part of the learned judge that the effect of 24 Vict., c. 10, would be to enlarge the Admiralty jurisdiction by removing the £50 limit in the recovery of seamen's wages; or, in other words, that the Act of 1861 has repealed sec. 189 of the Act of 1854. No other construction can fairly be put on the language of the learned judge. The Vice-Admiralty Act, 1863, was passed June 8 of that year. Its object was to extend the jurisdiction of Vice-Admiralty Courts, and among other things jurisdiction for the recovery of "claims for seamen's wages" was given without any limitation. The case of the tug *Robb*, 17 Can. L. J. 66, was decided in the Maritime Court of Ontario, October 6, 1880, in which it was held "That the Merchant Shipping Act of 1854 is not to be read in connection with the Vice-Admiralty Act of 1863, which gives jurisdiction to the Maritime Court of Ontario, and that therefore this Court has jurisdiction over any claim for wages." The Canadian Act of 1873, 36 Vict., c. 129, sec. 56, now R. S. C., c. 74, sec. 56, provides: "No suit or proceedings for the recovery of wages under the sum of two hundred dollars shall be instituted by or on behalf of any seaman or apprentice belonging to any ship registered in either of the said provinces in any

Court of Vice-Admiralty, or in any Superior Court of Record in either of said provinces, unless the owner of the ship is insolvent within the meaning of any Act respecting insolvency for the time being in force in Canada, or unless the ship is under arrest or is sold by the authority of any such Court, as aforesaid, or unless any judge, magistrate or justices, acting under the authority of this Act, refer the case to be adjudged by such Court, or unless neither the owner nor the master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore." This Act was reserved for the signification of Her Majesty, May 23, 1873, and such signification was subsequently given, and the Act became law, March 27, 1874. The case of *The Margaretha Stevenson*, 2 Stuart, 192, was decided in Quebec, June 13, 1873, contrary to the decision in the case of *The Robb*. This was prior to the passage of the Canadian Act, 36 Vict., c. 129, sec. 56. It is somewhat important also to note that in the Quebec case the Vice-Admiralty Act, 1863, is not even referred to in the argument of counsel, or the judgment of the Court. The case, so far as appears from the report, was decided purely under section 189 of the Act of 1854. The head note to *The Margaretha Stevenson* is: "The Merchant

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Shipping Act, 1854, excludes the Admiralty jurisdiction in suits for wages of masters and seamen, where the amount due is less than £50 stg. The evidence in this case showing a less amount to be due, the claim of a master was dismissed without exception to the jurisdiction pleaded." The learned judge of the Quebec Court, in support of his decision, cites the case of *The Harriett*, *supra*, which, as already pointed out, was decided prior to the passing of the Admiralty Act, 1861. Before the passing of the Act of 1861, it was never doubted but that the effect of sec. 189, of the Act of 1854, was to withdraw from the jurisdiction of the Court claims for wages less than £50.

A later case decided in the Quebec Court, *The Royal*, Cook, 329 (1883) follows the judgment in *The Margaretha Stevenson*. The Act establishing the Maritime Court of Ontario was passed by the Parliament of Canada, April 28, 1877, and conferred on the Court "all such jurisdiction as belongs, in similar matters within reach of its process, to any existing British Vice-Admiralty Court." It would therefore possess all the jurisdiction given to a Vice-Admiralty Court under the Act of 1863, without the limitation imposed by the Canadian Act of 1873, now R.S. C., c. 74, sec. 56. The Admiralty Act, 1861, enlarged the jurisdiction of the

High Court in claims for seamen's wages; and the Vice-Admiralty Court Act, 1863, that of Vice-Admiralty Courts for similar claims, but the Canadian Act of 1873, c. 129, sec. 56, re-imposed the limitation as to wages by excluding jurisdiction for claims under \$200. The Act of 1873 only applied to the Vice-Admiralty Courts of Quebec, Nova Scotia, New Brunswick, and British Columbia, but by a subsequent Act, 37 Vict., c. 27, its provisions were extended to the Vice-Admiralty Court of Prince Edward Island. For the recovery of wages the Vice-Admiralty Courts in Canada, after 1873, had not the right to entertain a claim under \$200. In this respect the jurisdiction was more restricted than in the High Court in England. But it is not necessary now to dwell upon the differences in jurisdiction between the High Court of Admiralty and the Canadian Vice-Admiralty Courts in respect of claims for wages, as, since the passing of the Colonial Courts of Admiralty Act, 1890, 53-54 Vict., c. 27, Colonial Admiralty Courts, coming under that statute, are clothed with the same jurisdiction as the High Court in England, saving a few immaterial exceptions. The Imperial Statute of 1890 has been adopted in Canada by "The Admiralty Act, 1891," 54-55 Vict., c. 29. If in

1890, when the Colonial Courts of Admiralty Act was passed, the High Court had jurisdiction to recover claims for seamen's wages under £50, it follows that the Admiralty Courts of Canada have a similar jurisdiction. As late as Dec., 1892, in the Nova Scotia Admiralty District, the Chief Justice, acting as Admiralty Judge, in the case of *The Bessie Markham*, held in accordance with the decision of *The Robb*, that sec. 189 of the Act of 1854 is repealed, and that the Court has authority to entertain a suit for any claim for wages. It is, therefore, submitted that no limitation at present exists in Canada, but that the Court has jurisdiction to entertain a suit for seamen's wages, although the amount sued for is under \$200. Formerly the master had no right to proceed in the Admiralty Court for the recovery of his wages, until it was given by the Act of 1854, sec. 191. He had no lien on the ship for his wages, and a right to proceed *in rem* was the foundation of the Admiralty jurisdiction. But by 7 & 8 Vict. c. 112, sec. 16, in case of the bankruptcy or insolvency of the owner of the ship, all the rights, liens and remedies at that time allowed the seamen for the recovery of wages were extended to the master. By sec. 10 of the Act of 1861, the right was granted both for his wages and disbursements on ac-

count of the ship, and under sec. 35 of the same Act, he can proceed either *in rem* or *in personam*. But the Court will not give costs to a master who has not, before bringing his suit, rendered accounts to his owners. *The Fleur de Lis*, L. R. 1 A. & E. 49; *The Royal*, Cook, 326.

A series of cases in the Admiralty Court, beginning with *The Mary Ann*, L. R. 1 A. & E. 8, and ending with *The Sara*, 12 P. D. 158, had decided that the master had a maritime lien on ship for disbursements, but on appeal to the House of Lords in the latter case, 14 App. Cas. 209, it was held that the master had no lien for his disbursements. The Merchant Shipping Act, 1889, 52 53 Vict., c. 46, was then passed to bring back the law to what it was supposed to be prior to the decision of the Lords in *The Sara*. But it has recently been held, even under the Act of 1889, that the master has no lien on the ship for disbursements for which he had no authority to pledge the shipowner's credit. *The Castlegate* (1893) A. C. 38. The release by the master of his personal claim against the shipowners for wages, does not operate as a release of his lien against the ship. *The Chieftain*, Br. & Lush, 212. The lien arises, although the master, in good faith, was hired by one fraudulently in possession of the vessel. *The Edwin*, *ibid* 281.

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Collision—Sailing Rules—Both Vessels to Blame—Division of Damages—Costs.

The tug G. was proceeding up the river St. John, and the tug V. coming down; when near Swift Point they came into collision, and the V. sank. The G., at the time of the accident, was, contrary to the rules of navigation, near the westerly shore on the port side of the vessel; the V. did not exhibit any masthead white light, as required by the regulations.

Held:—That both vessels were to blame; that the collision was occasioned partly by the omission of the V. to exhibit her masthead white light, but principally by the course of the G., and a moiety of the damage was given to the V. with costs.

The tugs General and Victor, on the night of June 19, 1883, came into collision on the river St. John, near Swift Point, and the Victor was sunk. The General was proceeding up the river, and the Victor coming down. Contrary to the sailing regulation, the General kept to the westerly or port side of the river going up, while the Victor failed to exhibit any white light at the masthead. As both vessels had failed to comply with the regulations, both were pronounced in fault, and one-half the damages sustained, with costs, were awarded to the owners of the Victor.

C. W. Weldon, Q. C., for promovent, the Victor, cited Marsden on Coll. (ed. 1880), 146, 173, 177, 182. *The Rhondda* (1), Pritch. Dig., p. 91; *Smith v. Brown* (2); *The Khedive* (3); *The Velocity* (4); *The Lapwing* (5); *The Bougainville* (6); *The Magnet*, *The Duke of Sutherland*, *The Funny M. Carvell* (7). The infringement of sailing rule on part of the General was such as by possibility might have contributed to the accident. Dom. Stat. 1880, c. 29, sec. 6; also Art. 15, sec. 2. *The Benares* (8).

C. N. Skinner, Q. C., for respondent. Neither party

(1) 8 App. Cas. 549.

(2) L. R. 6 Q. B. 729.

(3) 5 App. Cas. 876.

(4) L. R. 3 P. C. 44.

(5) 7 App. Cas. 512.

(6) L. R. 5 P. C. 316.

(7) L. R. 4 A. & E. 417.

(8) 9 P. D. 16.

charged accident to be caused by departure from regulations, promovent must be held to strict proof of negligence. *The Benares* (1) is in his favor. *The Velocity* does not apply, as ships were not crossing. Refers to *Kaye on Ship*. (ed. 1875) 905. *The Catherine of Dover* (2). When accident inevitable neither party can recover. *The Fenham* (3). Art. 21 only obligatory when passing another ship. Course pursued by Victor brought about collision. Refers to cases cited by promovent; also cites *The Englishman* (4); *The Kestrel* (5). The absence of the light on Victor caused the accident. She was sighted as a sailing vessel, and deceived the General by want of proper lights.

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Weldon, Q. C., in reply. Cites and discusses the Stat. 36 & 37 Vict., c. 85, s. 17. The General violated Art. 21; had no right to be on west side of channel. The absence of masthead light of Victor could not possibly have contributed to the collision. Also refers to *The James C. Stevenson* (6).

And now (January 14, 1884), the following judgment was delivered by

WATTERS, J. The collision in question took place on the night of the 19th June, 1883, off Swift Point, on the river St. John, about seven hundred feet from the western shore of the river, and about nine hundred feet from Swift Point. The river at and immediately below Swift Point is about a quarter of a mile in width, but widens from Swift Point to the westward, into Grand Bay.

The tug General was proceeding up river,* and the tug Victor was going down; the wind was southerly, and the tide nearly high, with a two-knot current. It was raining, but it was not a bad night for running—not a dark night—only a little thick with the rain. The tugs had both left Indiantown that night; the Victor had towed a schooner up to Millidgeville, on the Kennebecasis, and was returning when she met with the General.

I must first ascertain, as well as I am able, from the evidence, the position and courses of these vessels prior to and

(1) 9 P. D. 16.

(2) 2 Hag. 154.

(3) L. R. 3 P. C. 212.

(4) 3 P. D. 18.

(5) L. R. 4 P. C. 529.

(6) L. R. 5 P. C. 316.

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at the time of the collision, and then apply the rules enjoined by law with regard to vessels in the situation in which I may find these, and thus see how far one or both complied with or violated these rules, and caused the damage complained of.

First, as to the Victor.—After passing Boar's Head, the Victor kept a reasonable distance from Rivers' breakwater, then starboarded her wheel and laid her course for Swift Point. She first saw the white head-light of the General below Swift Point; next she saw the green light of the General over her starboard bow; this course of the Victor would show her green light to a vessel rounding Swift Point; so also by following this course (which the Victor kept until the collision) the green light of a vessel rounding Swift Point, and close inshore as the General was, would be visible to the Victor. This course the Victor followed until she reached a point about nine hundred feet from Swift Point, and about seven hundred feet from the westerly shore of the river, and had she not then and there met with the accident she would have passed within a short distance of Swift Point. This I find to have been the course followed by the Victor, and that she was pursuing the regular course for Swift Point, under a starboard helm.

What was the course and position of the General?

She was running up river for Swift Point. As she opened the point she saw over her port bow the green light of the Victor, not knowing, however, that it was the light of a steamer, as no masthead white light could be seen. After rounding Swift Point, at a distance from it of two hundred feet or less, she kept on her course for a short time, and within a very short distance of the place where the accident occurred, discovering that the green light was that of a steamer, she shifted her helm to port and stopped and reversed her engine, and the Victor, continuing her course, the collision almost immediately took place by the General striking the Victor on her starboard quarter. From this it appears that the General up to the time she shifted her helm to port, was nearer to the western shore than the Victor was. This I find to be the position of the General.

As to the lights upon the respective vessels, I find that the

General had all her lights in proper position, and that the side lights of the Victor were also in position, but that she left the harbor of Saint John and made the trip that night without the masthead white light, as required by the regulations.

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Now, the question arises, which of the parties is blameable for this collision, for it is not a case of inevitable accident? It is charged generally by the General on the answer to the libel "That the collision occurred solely through the inattention or want of skill of those on board the Victor," and it is further contended by counsel on her behalf, under the evidence, that the collision was owing to the absence of the masthead light on the Victor, by reason of which the General was deceived as to her being a "steamer." On the part of the Victor it is charged in the libel "That the collision occurred solely through the inattention or want of skill of the persons on board the General," and it is further contended by the counsel for the Victor, that the collision was occasioned by the non-observance by the General of Article 21 of the Regulations, and by her pursuing a wrong course up the river.

Let us examine the charge against the defendant, the General. Article 21, as contained in the Dominion Statute of 1880, prescribes that, "In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship." Now, it is of essential importance to the safety of both life and property that the rules prescribed by law for the navigation of vessels should be observed and obeyed by masters of vessels, and from the view I take of the course pursued by the General in coming to and rounding Swift Point, and pursuing her course so near to the westerly shore of the river, and on that side of the mid-channel which was on her larboard side, I am of opinion that she was acting in direct disobedience to the regulations and to the law; her own and proper side was on that side of the mid-channel which lay on her starboard side, and the evidence shows that the boldness of the shore and the depth of the water would have rendered that course safe and

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Next, was the Victor to blame in whole or in part for the collision? It is admitted and proved that she did not carry a white light, as required by Article 2 of the Regulations, she was, therefore, guilty of a non-observance of this rule. Then was the collision occasioned by this non-observance? From the evidence I am satisfied that the Victor was clearly upon her own side of the river, and had she exhibited the required white light there could be no shadow of excuse for

(1) 2 W. Rob. 8.

the General persisting in her course on that side of the river, as in all probability had that light been exhibited the collision would not have occurred. The neglect of the master of the Victor is without excuse, as it was his duty, and within his power, to have procured the necessary light, nevertheless he chose to disregard the law, and the consequences resulting from his neglect must fall upon him. This omission on the part of the Victor must be taken to have partly contributed to the accident; besides it appears that tug-boats are accustomed, notwithstanding the express rule of law requiring them to keep on that side of the mid-channel lying on the starboard side of their vessel, to navigate the river as best suits their own conveniences for the time being. Now, whilst so reckless a practice is in existence, each captain must be held to the exercise of the utmost care and precaution, and liable for any damage resulting from its abuse. Upon the whole case I am of opinion that both vessels were to blame, the collision having been occasioned partly by the omission of the Victor in not having her mast-head white light, but principally by the course pursued by the General and by her non-observance of Article 22 of the Regulations, and I therefore pronounce for a moiety of the damage sustained by the Victor, with costs, and I assess these damages under the evidence offered at the sum of fifteen hundred and seventy-five dollars (\$1,575).

Decree accordingly.

In cases of collision, where both ships are found in fault, the party proceeding can only recover a moiety of his damages; and in the event of a cross-action or counter claim the damages are divided, each party recovering half his own loss. W. & Bruce (2nd ed.), 86. See also *The Aurora*, Lush. 327; *The Celt*, 3 Hag. 329 n.; *The Oratava*, Marsden's Ad. Cases, 337. For

early cases, where the rule as to division of damages was applied, see Marsden's Ad. Cases, from p. 235 to p. 339. This is the rule, although greater fault attaches to one ship than the other. *The Petersfield* and *The Judith Randolph*, *ibid* 332. The same rule of indemnity obtains in the United States. In Meyer's Federal Decisions, vol. 23, p. 1117, it is said: "The authorities con-

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clusively show that according to the general maritime law, in cases of collision occurring by the fault of both parties, the entire damage to both ships is added together in one common mass and equally divided between them, and thereupon arises a liability of one party to pay to the other such sum as is necessary to equalize the burden. This is the rule of mutual liability between the parties. But when claims are prosecuted judicially the Courts regard the pleadings, and the English Courts are very strict in holding the parties to their allegations, and in refusing relief unless it is sought in a direct mode. If only one party sues, and the other merely defends the suit, and upon the proofs that both parties are in fault, the Court declares the fact in the decree, and decrees to the libellant one-half of the damage sustained by him—the damage sustained by the respondent not being regarded as the subject of investigation determinable in that suit. This technical result of the form of proceeding and pleadings, in which the respondent suffers himself to be placed in a position of disadvantage, has led to the erroneous notion that each party is entitled by the law to be paid one-half of his damage by the other party; and that each claim is independent of the other. But when both parties file libels, as they are

entitled to do, although, to conform to the pleading, a decree may be rendered in each suit in favor of the libellant for one-half of his damage, even the English Courts will not allow two executions, but will grant a monition in favor of that party who has sustained most damage for the balance necessary to make the division of damages equal. This is an awkward way of arriving at the result contemplated by the law. It may have its conveniences in some cases, as when the innocent owners of cargo are the libellants, for they are not responsible for any part of the loss. But as between shipowners themselves it involves an apparatus of two distinct suits to get at one result, when one suit, or two suits consolidated together, would be in every respect more convenient. The difficulty is obviated in England, to a certain extent, where each party has brought suit, by directing, with the assent of the parties, that the proceedings shall be conducted together so as to save the expense of a double investigation." For American cases see *The Atlas*, 3 Otto. 302; *The Alabama*, 2 Otto. 695; *The Wanata*, 5 Otto. 600; *The North Star*, 16 Otto. 17; *The Potomac*, 15 Otto. 630.

Prior to the Act of 1861 it was customary for the solicitors of the litigant parties, in cases of cross actions, to agree that the decision in one case should gov-

ern in the other. This course was optional with the solicitors, as the Court had no power to compel such a course. But, by sec. 34 of that Act, the High Court of Admiralty, on the application of the defendant in any cause of damage, and on his instituting a cross action for the damage sustained by him in respect of the same collision, may direct that both causes be heard together, and on the same evidence. The same power can also be exercised by a Colonial Court of Admiralty. The defendant is not in general, after the first action is decided, precluded from instituting a cross action. *The Calypso*, Swa. 28; but the practice is not to be encouraged, and the Court will discountenance it by refusing costs. Under rule 27, relating to Canadian Admiralty Courts, a defendant appearing, having any set-off or counter claim, may indorse on his appearance a statement of such set-off or counter claim, and the ruling asked for, and upon the trial of the cause, the set-off or counter claim can be freely dealt with by the Court. The judge, however, may direct a separate action if he thinks it can be more conveniently disposed of in that way. In the case of *Chapman v. The Royal Netherlands Steam Navigation Co.*, 4 P. D. 157 (1879), it was held that "in an action of collision in the Admiralty Division, where both ships have

been injured, and both ships have been held to blame, and have accordingly been condemned to pay the moiety of each other's damage, and either of the parties to the collision has applied to have his liability limited under the Merchant Shipping Act, 1862, sec. 54, no set-off is allowed between the two amounts for which they are liable in damages, until the limitation of liability imposed by that statute has been applied." This judgment reversed the decision of Jessel, M. R. The judgment, however, in the Court of Appeal was that of Baggallay and Cotton, L. J.J., and was dissented from by Brett, L. J., who agreed with the Master of the Rolls. As to the general principle applicable in such cases, Jessel, M. R., at p. 160, says: "When two ships come into collision, and both are in fault, one or the other can recover damages, and only one of the two, because the result of the action is that either the plaintiff or the defendant is to win something. That is the meaning of it. The consequence of the collision is that damage being done to one or both vessels, the owners of one vessel can recover something from the other. The Admiralty rule in such case is to take the amount of damage done to each vessel, to add them together, and to halve the amount, so that each owner is *inter se* to bear half, and then to

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ascertain who is to pay to the other, and the monition finally issues for the balance. That is all that is ever recovered in the action. That is the substance of it. The one party who wins recovers from the other party, who loses, damages by reason of the collision. The mode of arriving at the amount of damages is what I have stated; by reason of our very curious procedure, and very curious rules of law, it is an odd mode, but the substance is, in my opinion, what I have stated."

The rule of law, as laid down by the Court of Appeal, was not received with general approbation, and the question was brought before the House of Lords in *The Stoomvaart Maatschappij Nederland v. The Peninsular and Oriental Steam Navigation Co.* (*The Khedive*), 7 App. Cas. 795 (1882), when the case of *Chapman v. Royal Netherlands Steam Navigation Co.*, 4 P. D. 157, was overruled. The rule was again laid down in a still later case in the Court of

Appeal in *The London Steam. Owners' Insurance Co. v. The Grampian Steamship Co.*, 24 Q. B. D. 663 (1890), in which it was held "Where there is a collision between two vessels, by which one of them is more damaged than the other, and both being to blame, they have to share the damage equally, there is not a cross liability on the part of each vessel to pay half of the damage sustained by the other, but one liability only, viz., the liability of the vessel less damaged to pay the vessel more damaged one-half of the amount by which the damage to the one exceeds the damage to the other." In general, costs are given to neither party where both are in fault. *The Oratava*, Marsden's Ad. Cases, 337; *The Washington*, 5 Jur. 1067; *The Shannon*, 1 W. Rob. 463; *The Elizabeth Jenkins*, L. R. 1 P. C. 501; and this rule as to costs obtains in the Court of Appeal. *The Hector*, 8 P. D. 218; *The Rigborgs Minde*, *ibid*, 132; W. & Bruce (2 ed.) 88.

THE MINNIE GORDON—McILGORNE.

1885

June 13.

Collision—Light-ship—Inevitable Accident—Costs—Not given against Crown.

The vessel M. G., under command of a pilot, was entering the Miramichi, and near the Horse Shoe Bar, in the lower part of Bay du Vin, came into collision with a light-ship there placed for the safety of navigation.

Held:—That under the evidence no fault was attributable to the M. G.; that it was a case of inevitable accident, and the suit was dismissed, but without costs, as the Crown was the promovent, and no costs can be given against the Crown.

This was a cause of collision promoted by the Attorney General of Canada, representing Her Majesty the Queen, against the ship Minnie Gordon, for damage done to the light-ship placed near the Horse Shoe Shoal in Miramichi Bay. The preliminary act of the promovent charged that the accident took place on the afternoon of August 6, 1882; that the weather at the time was fine and clear; that the tide was running about two miles an hour; that the light-ship could do nothing to avoid the collision, as it was anchored; that the starboard bow of the Minnie Gordon struck the light-ship about the centre of the stern; and that the vessel was in fault for the collision in running to the windward of and close to the light-ship, and attempting to tack at a point where there was not sufficient room. On the part of the respondent it was alleged that the wind was south-west to west south-west, veering from south-west to west south-west; that the wind was blowing a moderate breeze; the weather fine and clear; the tide running flood about an hour before the vessel reached the light-ship, and running about a knot an hour. The course of the vessel, when the light-ship was first seen, was about north north-west, with a speed of about eight miles an hour, and the light-ship, when first seen, was about four miles distant, bearing about west north-west. The vessel was in charge of a pilot, and the place of the collision within the pilotage district of Miramichi, and that the pilotage was compulsory.

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It was also alleged that the pilot started with the vessel at the proper time of tide to bring her inside the outer bar, and sailed up with a leading wind to the entrance, when the wind would not permit the vessel sailing over the Horse Shoe Bar, and the pilot attempted to beat over, and after making two or three short tacks in the narrow channel the vessel weathered the light-ship on the port tack, the wind then being west south-west, but could not weather the south-west point of the bar; that owing to the variable state of the wind the vessel did not come around as quickly as usual. She took a stern board before she fell off on the starboard tack, which threw her close to the light-ship, rather to the north; a flaw wind filled the sail, she forged ahead, and her starboard bow struck a light blow on the light-ship's quarter. Captain Prichard was present as nautical assessor.

L. R. Harrison and Stephen Rand, for plaintiffs.

F. E. Barker, Q. C., and *H. H. McLean*, for the vessel and owners.

WATTERS, J., summed up to the nautical assessor as follows: The question in this case is whether this collision was an inevitable accident. It would not be so if it were possible by ordinary skill and caution to have avoided it. Was there any want of ordinary skill and caution on the part of the pilot in tacking the Minnie Gordon up to the point where the gust of wind struck her? Was such point inside, *i. e.*, to the north of the buoy? Considering the state of the wind, the weather, the time of day, the time of tide, and that no other vessels were in the way, and that the Minnie Gordon had an experienced pilot on board, can the collision be considered an inevitable accident? I shall take the opinion of the nautical assessor who has attended the hearing, and has heard the evidence, whether all measures were taken which, under the circumstances, should have been taken by the pilot to avoid the collision.

And now (June 15, 1885), the following judgment was delivered by

WATTERS, J. Captain Prichard, by whom I am assisted, is of opinion that, under the circumstances, no blame can

be attached to the Minnie Gordon for the collision. The channel, although narrow, is a public thoroughfare, clearly marked by buoys for all vessels to navigate, and the Minnie Gordon was not to blame for beating close to the buoy next above the light-ship. There was nothing in the state of the weather to deter the pilot from passing to windward of the light-ship and approaching close to the buoy, and thus making her tack as long as possible. Moreover, if the wind had kept steady, he was safe in so doing, and in the ordinary course would have gone round all right, as there was plenty of water (eighteen feet) at the buoy; but having arrived at the buoy, and as he was coming in stays, the ship met with a heavy gust of wind more southerly, which killed her way and prevented her from coming round, and caused her to take a stern board; this dropped her down inside the buoy and towards the light-ship. This state of things suddenly happening was wholly unexpected, and caused the subsequent trouble. The pilot swears that if the gust of wind had not struck her, the Minnie Gordon had plenty of room to go about and clear. Afterwards the assessor finds, that the pilot handled the ship as well as it was possible to do, and made the best efforts he could to keep clear of the light-ship. I concur with the opinion of the assessor, which is borne out by the evidence. This was, therefore, an unavoidable accident, and my decree is that the suit must be dismissed.

As to costs. If I should decree costs against the Crown, payment could not be enforced. No doubt upon the matter being properly represented, the defendant's costs will be paid by the Crown. In cases of unavoidable accident the Court exercises a discretionary power in granting costs. *The London* (1). In this case the Court would, if the cause were between two subjects, dismiss the suit with costs, as it must have been evident to the officer in charge of the light-ship that the collision was an unavoidable one.

Action dismissed.

(1) Br. & Lush. 82.

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An inevitable accident, in view of the law, is that state of circumstances which could not have been avoided by the exercise of ordinary skill, ordinary caution, and diligence. It is not necessary that there should be extraordinary skill, or extraordinary precaution; but if the accident could have been avoided by ordinary skill, diligence, and precaution, then it is not inevitable accident. Kay on Ship., vol. 2, 912. But an accident is not inevitable merely because it could not be prevented at the very moment at which it occurred. When it might have been prevented, if proper and reasonable measures had been previously taken, it is not inevitable.

In MacLachlan on Ship. (ed. 1892), p. 324, it is laid down that if the damage is done under circumstances in which it is not avoidable by ordinary care and skill, or common foresight, the loss lies where it fell. To the same effect see W. & Bruce (ed. 1886), 85. The catching of a cable on a windlass in running out may be an inevitable accident. *The Peerless*, Lush. 30. The term as applied to a collision means a collision which occurs when both parties have endeavored by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident.—*Union Steamship Co. v. New York,*

etc., Steamship Co., 24 How. 307; *The Margaret*, 2 Stuart 19; *The McLeod*, *ibid* 140. The defence is never admitted except when the evidence shows that neither vessel was in fault. *Ibid*. See also *The Batavier*, 1 Spks. 378 s. c. 2 W. Rob. 407; *The Europa*, Br. & Lush. 89 s. c. 2 Eng. L. & Eq. 557; *The Mellona*, 5 N. of Cas. 450 s. c. 3 W. Rob. 21. In the case of *The Bolina*, 3 N. of Cas. 208, Dr. Lushington says: "With regard to inevitable accident, the onus lies on those who bring a complaint against a vessel, and who seek to be indemnified. On them is the onus of proving that the blame does attach upon the vessel proceeded against." See also *The Virgil*, 2 W. Rob. 205. As to what is inevitable accident, see also the cases in Nova Scotia. *The Chase*, Young Ad. Decisions 113; *The Richmond*, *ibid* 164. To support a plea of inevitable accident the burden of proof rests upon the party pleading it, and he must show, before he can derive any benefit from it, that the damage was caused immediately by the irresistible force of the winds and waves; that it was not preceded by any fault, act or omission on his part as the principal or indirect cause; and that no effort to counteract the influence of the force was wanting. *The Agamemnon*, Cook 60. Such a plea cannot be sustained by a ship sailing seven knots an hour

in a fog over fishing grounds on the banks of Newfoundland. *The Frank*, *ibid* 81; or where the vessel proceeded against had attempted to bring up in bad weather in an improper position, and unprovided with proper appliances for doing so. *The Ida*, *ibid* 275. In the case of *The Hunter* and *The Amity's Friendship*, Marsden's Ad. Cas. 322, Sir Thomas Salusbury held that the loss was merely accidental, and therefore gave no damages or costs on either side; so also in the case of *The Three Relations* and *The Britannia*, *ibid* 331, Sir James Marriott gave a similar judgment. In *The Maresia*, L. R. 4 P. C. 212, it was held that where, in a case of collision, the defence is inevitable accident, the onus of proof lies, in the first instance, on those who bring the suit against the vessel, and seek to be indemnified for damage sustained; and does not attach to the vessel proceeded against until a *prima facie* case of negligence and want of due seamanship is shown. It is also laid down in the same case, following the decision in *The London*, Br. & Lush. 82, that it is a rule of the Admiralty Court, in cases of inevitable accident, to make no order as to costs unless it can be shown that the suit was brought unreasonably and without sufficient *prima facie* grounds. See also *The Swansea*, 4 P. D. 115. A sail-

ing ship in a gale drove from her anchors and came into collision after sunset with a brig at anchor. The ship had only her anchor light exhibited. Held an inevitable accident, and no costs given on either side. *The Buckhurst*, 6 P. D. 152. See also *The Itinerant*, 2 W. Rob. 236 s. c. 3 N. of Cas. 5; *The Ebenezer*, *ibid* 206; *The Shannon*, 1 W. Rob. 463. But there may be circumstances under which, in a case of inevitable accident, the vessel proceeding may be condemned in costs. *The Thornley*, 7 Jur. 659. In the case of *The Washington*, 5 Jur. 1067, Dr. Lushington ordered the damages, costs and expenses of both parties to be thrown together and to be equally divided, as was done in *Hay v. Le Neve*, 2 Shaw (Sc.) App. Cas. 395; *The Monarch*, 1 W. Rob. 24. Since the Judicature Acts in England the Court, in cases of inevitable accident, will use its discretion as to costs. *The Innisfail*, 3 Asp. N. S. 337. A defendant succeeding on that ground will be entitled to his costs. *Ibid*. A discretion as to costs is also given to the judge in the Canadian Admiralty Courts. See rules of 1893, Nos. 132 and 133. The case of *The Leda*, Br. & Lush, 19; s. c. 32 L. J. Ad. 58; 32 L. T. N. S. 58, is a leading one on the question of costs, where the Crown is a party. Prior to the Imperial

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Statutes, 18 & 19 Vic. c. 90, the Crown was not liable to pay costs. This was laid down in the House of Lords in the case of *The Lord Advocate v. Lord Douglas*, 9 Cl. & F. 173. And after the passing of that Act it was held in *The Leda*, *supra*, that it only authorized costs to be given to or against the Crown in proceedings in which the Attorney General or Lord Advocate is a party. The case of *The Leda* is instructive, as it declares the law in the several courts both before and after the passage of 18 & 19 Vic. c. 90. Dr. Lushington, in delivering judgment, at p. 25, says: "In the Admiralty Court, the Crown neither gave nor took costs. Such was my decision in the

case of the *Duke of Sussex*, 1 W. Rob. 270—a decision founded upon the practice of the courts of common law, and the doctrine generally acknowledged in the profession. It is customary, however, for the Crown to give costs as a matter of grace. They are given, however, against co-plaintiffs with the Crown. *The Swallow*, Swa. 30, and in informations before the statute, a relator was added for the express purpose that costs might go with the decree. The injustice of making subordinate parties liable for the whole costs is, after all, only an apparent one; they will, no doubt, be indemnified by the Admiralty," *The Leda*, *supra*, p. 27.

THE MAUD PYE—DIXON.

1885

Nov. 28.

Collision—Lights—Lookout—Preliminary Act—Amending.

The M., close hauled on the port tack, heading about south-west by west, and going about three knots an hour, with the wind south, came into collision with the M. P., heading east, and running free about ten knots an hour, and was totally lost.

Held:—From the evidence, that the M. P. had no proper lookout; that failure to have a proper lookout contributed to the collision, and she was accordingly condemned in damages and costs.

The schooner Merlin, of about 100 tons burthen, lumber laden, on the 20th of August, 1885, sailed from the port of St. John, N. B., for Boston. About 3 a. m. of August 22, nine miles south-east by east of Petit Manan light, she came into collision with the Maud Pye, hailing from St. John, N. B., of 99 tons burthen, on a voyage in ballast from Boston to Moncton. The Merlin was so damaged that she became a total loss. It was alleged, on the part of the plaintiff in his preliminary act, that the wind at the time was about south, the weather clear with a fresh breeze; that the Merlin, when she sighted the Maud Pye, was close hauled on her port tack, and heading about south-west by west, and going about three knots an hour; that she, at the time, had the regulation lights properly fixed and burning brightly; that the Maud Pye was distant about a mile, bearing south-west by west to south-west. Those on board the Merlin, it was alleged, when they first sighted the Maud Pye, saw both the red and green lights; that as she approached, nearly head on, those on the Merlin hailed her several times to luff and keep clear, but she kept on her course, when the Merlin put her helm hard up, but she was almost immediately struck by the Maud Pye between the bowsprit and the fore rigging on the port side, the port bow of the Maud Pye striking the port bow of the Merlin. It was also alleged that the Maud Pye had no sufficient lookout; that she should have luffed up into the wind when

1885. *The Maud Pye* hailed, and thereby avoided the collision. The *Maud Pye*, among other things in her preliminary act, alleged that the weather was very dark; that she came into collision with the *Merlin* about 2.30 o'clock on the morning of the 22nd August; that no lights were seen on the *Merlin* before or after the collision; that the *Maud Pye* was going about ten knots an hour, and that no measures could have been taken by her after sighting the *Merlin* to avoid the collision.

The defendants appeared to the action but did not counter-claim, but after filing their appearance and preliminary act, applied to the judge to order pleadings under the rules. This the judge refused to order, but gave defendants permission to amend their appearance by indorsing upon it a counter-claim. The defendants then filed a further appearance with a counter-claim indorsed, claiming damages from the plaintiff by reason of the collision. There was no direct positive evidence on the trial that the *Merlin* and the *Maud Pye* were the two vessels in collision, as the vessel damaging the *Merlin* sailed away immediately after the accident without giving her name. As there was some doubt, the counsel for the *Maud Pye* on the argument asked to amend the preliminary act so as to suit that contention.

Captain Prichard was present during the trial as nautical assessor.

C. A. Palmer, for plaintiff.

C. W. Weldon, Q. C., and *H. R. Emmerson*, for defendants.

WATERS, J. I refuse the application of the defendants to amend their preliminary act. After consultation with the assessor, I find that the schooner *Merlin*, on the night and at the time of the collision, had her proper lights in position and burning. I find that the cause of the collision was the want of a proper lookout on board the schooner *Maud Pye*, which was running free. I pronounce for the damages \$800, the value of the vessel, and \$115 the loss of freight; in all \$915, and for costs.

Decree accordingly.

AMENDMENT.

By Canadian rule 67 of 1893, any pleading may at any time be amended, either by consent of the parties, or by order of the judge. Very extensive powers to amend all pleadings exist under the English practice.—The Court or judge may at any stage of the proceedings allow either party to amend or alter his indorsement or pleadings in such manner and on such terms as may be just, and so that all such amendments be made as may be necessary for determining the real question in controversy between the parties. The Court has power even after judgment to grant leave to amend the indorsement of claim on the writ. *The Dictator* (1892), P. 64.

PRELIMINARY ACTS.

The right to amend, it would seem, does not apply to preliminary acts. The statute 3 & 4 Vic. c. 65, was passed to extend and improve the practice of the High Court of Admiralty. Under its rules and regulations were adopted, and confirmed by order in Council, December 7, 1855, by which it became necessary to have preliminary acts in collision cases. The object of preliminary acts is to obtain a statement *recenti facto* of the leading facts and circumstances of the case, and by that means to prevent either party changing his statement to meet the case of

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other vessel. A party will not be allowed to give evidence to contradict a fact stated in his preliminary act. *The Inflexible*, Swa. 32. When a collision case is to be heard on *viva voce* evidence the preliminary acts are exchanged before the evidence is taken. *The Ruby Queen*, Lush. 266; *The Friends*, *ibid* 552. In Canada, under rule 116 of 1893, the preliminary acts may be opened as soon as the action has been set down for trial. Preliminary acts are only required in collision cases in actions of one ship against another. *The John Boyne*, 36 L. T. N. S. 29.

DAMAGES.

For cases as to recovery of damages, and the principle followed in awarding the same, see note to the case of *The General*, *ante* p. 91. Damage by collision was done to a vessel shortly after a contract had been made by her owners for another voyage upon the completion of the voyage she was then on. In consequence of the injury, repairs rendered necessary could not be completed in time to enter upon the contract. It was held that the loss of the earnings contracted for was not too remote, but "that damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act, cannot be regarded as too remote." *The Argentino*, 14 App. Cas. 519. But a loss of market considered

too remote. *The Notting Hill*, 9 P. D. 105.

LOOKOUT.

Vigilance, as well as experience, is required of a lookout; and if he is inattentive to his duty, it is no sufficient excuse to say that he was competent to perform the required service. Myer's Fed. Decisions, vol. 23, sec. 4935, p. 977. Not only should there be one or more on deck for the purpose of looking out, but they should be properly stationed. Lowndes on Coll. 68. It is no excuse to allege that from the intensity of the darkness no vigilance, however great, could have seen the other vessel in time to avoid the collision. *The Mellona*, 3 W. Rob. 7. The proper position for the lookout on paddle wheel steamers plying in crowded thoroughfares is on the bridge between the paddle boxes. *The Wirrall*, *ibid* 56. A strict lookout is not so essential to a vessel having the right of way as to one bound to give way. *The Progress*, 7 Mitch. 433. One or two hands should be specially stationed on the lookout by day as well as at night. *The Diana*, 1 W. Rob. 131; *The Glannibanta*, 1 P. D. 283; one on a large steamship in a crowded part of the English Channel insufficient. *The Germania*, 3 Asp. 270 s.c. 21 L. T. N. S. 44. But on the Clyde, in daylight, the pilot, an officer and a seaman held sufficient. *Clyde*

Nav. Co. v. Barclay, 1 App. Cas. 790. On the Thames the lookout should be on the fore-castle head. *The Hallett*, Ad. Div. Aug. 9, 1887; and it is negligence on the Tyne without an anchor watch. *The Pladda*, 2 P. D. 34. The absence of a lookout, contributing to collision, renders vessel liable, although the other vessel had not observed the regulations as to light. *The Englishman*, 3 P. D. 18. Fault does not necessarily attach to a vessel for not having a lookout astern on a clear night. *The Earl Spencer*, L. R. 4 A. & E. 431; *The City of Brooklyn*, 1 P. D. 276; but would be held in fault probably for not showing stern lights. *The Nevada*, 16 Otto. 154. A ship having another in tow must be especially vigilant, and have a lookout for both. *The Jane Bacon*, 27 W. R. 35. Local rules of navigation may enjoin greater strictness in some places than in others. *The Margaret*, 9 App. Cas. 873. Glasses must be used where really needed. *The Hibernia*, 2 Asp. 454; and they were held necessary where a steamer was coming into a harbor at night. *The Ville du Havre*, 7 Benedt. 328. See also *The Clementine*, Young's Ad. Decisions, 186; *The Alhambra*, *ibid*, 249; and *The Iona*, L. R. 1 P. C. 426. The ship is responsible for the fault of her lookout. *The Mary Bannatyne*, 1 Stuart, p. 355. The owner is liable when

the accident is attributable to a deficiency of lookout and management on board of the vessel doing the damage. *The Secret*, 2 Stuart, 133; and not the pilot. *The Oriental*, *ibid*, 144. The American law as to lookout is fully as strict as in England or Canada. See the case of *The Sunnyside*, 1 Otto. 208; *The Atlas*, 10 Blatchf. 459. Two first-class men should be on the lookout on an ocean steamer; the officer in charge of the deck not sufficient, and they should be placed in the ship's bows. *Chamberlain v. Ward*, 21 How. 548; or in the part of the ship from which other vessels can best be seen. *The Morning Light*, 2 Wall. 550. In *The Ariadne*, 13 Wall. 475, the Supreme Court of the United States held that the vigilance required as to lookout rose according to the speed and power of the vessel and the chances of meeting other vessels. A vessel entering a harbor at night should have all the crew on deck. *The Scioto*, Davis 359, and daylight does not excuse the absence of a lookout. *Catherine v. Dickinson*, 17 How. 170.—Ferry-boats and vessels crossing the track of ferry-boats must be especially careful. *The America*, 10 Blatchf. 155; *Ince v. East Boston Ferry Co.*, 106 Mass. 149. A man at the wheel on a pilot boat is not sufficient. *The Blossom*, Olcott 188.

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Dec. 12.

THE EMMA K. SMALLEY—COUSINS.

Collision—Fog-horn—Lookout—Inevitable accident—Libel—Evidence—Variance.

The V., stone-laden, on a voyage from Dorchester to New York, off Tynemouth Creek, in the Bay of Fundy, close hauled on the starboard tack, came into collision with the E. K. S., running free, in ballast, going up the Bay to Moncton. The night was dark and foggy, and from the evidence it appeared that the V. had no mechanical fog-horn, as required by the regulations, and that the one she had was not heard on board the E. K. S., which was to windward.

Held:—That it was a case of inevitable accident; that the E. K. S. was not to blame, and the action was dismissed without costs to either party.

It is a rule of the Admiralty that where there is a material variance between the allegations of the libel and the evidence, the party so alleging is not entitled to recover, although not in fault, and fault is established against the other vessel.

This is an action of collision promoted by the owners of the Canadian schooner Vesta, against the American schooner Emma K. Smalley. On the part of the promovents it is alleged in their libel that on September 2, 1882, the schooner Vesta, of the burthen of 130 tons, left Dorchester for New York. On the evening of September 3, about 9 p. m., the Vesta was off Tynemouth Creek, in the Bay of Fundy. The wind then was blowing fresh from about west south-west. The Vesta was then on starboard tack, close hauled, and heading about south. The Vesta then sighted the Emma K. Smalley about four hundred yards distant, running free before the wind, and heading about north-east, or more easterly. The Vesta kept her fog-horn going constantly, and could plainly discern the Emma K. Smalley. The latter vessel was then at a sufficient distance from the Vesta, by the exercise of ordinary care, to have averted the collision. The Emma K. Smalley improperly held on her course, and ran directly into the Vesta, striking her about the starboard main chains, and cutting her down to the water-ways. The Emma K. Smalley, when sighted, was to windward of the Vesta, and the collision occurred solely through inattention

of the Smalley. The Vesta was then of the value of \$4,000, and was built in 1872. The Vesta's cargo was one hundred and eighty tons building stone, of value of \$2,000.

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The responsive plea of defendant alleged that:

The Emma K. Smalley is not a British vessel, but belongs to Eastport, State of Maine, of 185 tons. That she sailed from Lubec, Me., on September 2, 1882, for Moncton, in ballast. On September 3, 1882, day commenced with thick fog, wind south-west, light breezes. At 1 p. m., fog lifted, and Emma K. made Cape Spencer at about one-half mile. She was then laid on a course east by south, and was continued up to 8 p. m., the fog still very thick, with smoke as night came on, and wind shifted to south south-west. Took in topsails, and furled outer jib. At 8 p. m., the course was changed to east, and from that to time of collision the wind was south south-west abaft the beam. She was kept on the starboard tack, heading east, and going not more than three knots. The tide was running to the west about two knots. At 8 p. m., the blasts on the fog-horn were changed from one to three blasts, and kept constantly going at intervals of not less than a minute up to the time of the collision. Three blasts were blown each time.

A sharp lookout was kept, and there was on deck before and at the collision, captain, mate, cook, and seaman Moran. The mate was on the lookout, John Moran was at the wheel, the cook was forward, and the captain on deck keeping a good lookout. Just previous to and at the time of the collision the fog was very thick with smoke, so that it was impossible to see far ahead. At about 9 p. m., those on Emma K. Smalley heard some one on another vessel, which afterwards turned out to be the Vesta, calling out "Hard up, you are coming into us," or something to that effect, which order was obeyed by the Emma K. Smalley, and almost immediately afterwards the Emma K. Smalley fouled with the Vesta about the main rigging of the Vesta, breaking off the Emma K. Smalley's jib-boom, and breaking the cathead on port side, bow rail on port side, and starting cutwater over to starboard. The vessels were together about five minutes, then parted, and the Vesta passed under the bow of the

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Emma K. Smalley and out of sight to port in the fog, leaving two men on the Emma K. Smalley. At the time of the collision the wind was not blowing fresh from about west south-west. •The Vesta was not heading about south. The Vesta did not sight the Emma K. 400 yards distant. The Vesta did not keep her fog-horn going constantly, and could not plainly discern the Emma K. Smalley. The Emma K. Smalley was not seen by the Vesta at a sufficient distance from the Vesta. Not true that by exercise of ordinary care the Emma K. Smalley could have avoided the collision. Not true that the course of the Emma K. Smalley previous to the collision was improper. Not true that collision occurred through the inattention of the Emma K. Smalley. That just previous to the collision the wheel of the Vesta was put in weather becket, and so remained; and after the vessels got clear, the Vesta came round again to the stern of the Emma K. Smalley. The collision would not have occurred if the wheel of the Vesta had not been put in the weather becket. That the captain of Vesta at time of collision came on board Smalley in his shirt and drawers. Next morning the Vesta carried all sail going to Dorchester, which she could not do if mainsail had been cracked. The Smalley did not have any fog-horn previous to collision. That no fog-horn was blown by Vesta, or if blown, not loud enough to be heard a proper distance. The Vesta is a British vessel, and was not provided with such a fog-horn as is required by the regulations. The lights of the Smalley were larger and more powerful than those of the Vesta, and could be seen through thick fog a greater distance. The lights of the Vesta were not according to regulation. The Vesta was not going at a moderate rate of speed previous to and at the time of the collision. If the Vesta had been going at a moderate rate of speed the collision would not have happened, or if it did happen, would not have damaged either vessel. The Vesta's starboard quarter was not badly damaged, and only one main chain broken; \$100 damage done. The Vesta was not of the value of \$4,000, not more than \$800. Capt. Prichard assisted the Court as nautical assessor.

D. L. Hanington, Q. C., and C. A. Palmer, for promovent.

As *Vesta* was close hauled on starboard tack, and the *Smalley* running free, under Article 22 *Vesta* should keep her course. Under the article and sailing rule, respondents were sufficiently far away when they sighted the *Vesta* to have kept clear, which they did not do by reason of having no proper lookout. As to damages, the correct rule is to allow the amount with interest from time damage received to time of payment. When not a total loss, in addition what could have been earned, and expenses of supporting captain and crew.

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C. W. Weldon, Q. C., for respondents. The libel is only injury to vessel. Nothing said about loss of earnings, cost of provisions, and other expenses. Parties are bound by their statements. Cannot shift case by evidence at variance with libel. 2 Pritch. Ad. Dig. 568, sec. 795. *The North American* (1); *The Ann and Margaret* (2). Case must be proved as alleged. The charge in libel is that they saw a vessel running S.; that we were running N. E., continued our course, and brought about the collision. Respondents say they heard no fog-horn. Allegation in libel is that we continued our course and caused the collision. The evidence of plaintiff is that we changed our position by luffing and caused it. The plaintiff has failed in proof; there was a fog—a fog-horn was required; did not blow until the *Smalley* was sighted; no regulation fog-horn. *The Love Bird* (3).

Hanington, Q. C., in reply. We are not confined to allegations; we must prove the injury sustained, which has been done. The exact mode of causing the injury need not be alleged. If we allege the wrong and injury done, and prove it, that is sufficient. The wrongful or negligent act by which that injury was done need not be alleged. We had the right of road; it is upon respondents to prove our failure to comply with the regulations. They had no lookout; it was their duty to have a sufficient one, as the night was smoky and foggy. Our horn was blown. The onus is on defendants. In the case of *The Love Bird*, the evidence

(1) 12 Moo. P. C. 331.

(3) 6 P. D. 80.

(2) 13 Moo. P. C. 198.

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 SMALLEY. was that the vessel had not the regulation fog-horn. They have not proved that we had not complied with the regulation as to a fog-horn. Refers to 43 Vict., c. 29, sec. 8. *The Margaret* (1).

WATERS, J. This is a suit promoted by the owners of the schooner *Vesta*, of the burthen of 130 tons, against the schooner *Emma K. Smalley*, of the burthen of 180 tons, to recover for damages to the *Vesta* occasioned by a collision between 9 and 10 p. m., on the 3rd September, 1882, off Tynemouth Creek, in the Bay of Fundy. The *Vesta* was bound from Dorchester to New York, laden with building stone. The *Emma K. Smalley* was proceeding up the Bay to Moncton, in ballast. On the part of the *Vesta* it is stated in the libel that the wind was blowing fresh from about west south-west, that the *Vesta* was on the starboard tack, close hauled, heading about south, that she sighted the *Emma K. Smalley* about four hundred yards distant to windward, running free, and heading about north-east. That the *Vesta* kept her fog-horn going constantly, that she could plainly discern the *Emma K. Smalley*, which was then at a sufficient distance, by the exercising of ordinary care, to have avoided the collision. That the *Emma K. Smalley* improperly and wrongly held on her said course, and ran directly into the *Vesta*, striking her about the starboard main chains, and cutting her down to the water-way.

On the part of the *Emma K. Smalley* it is replied that on the 3rd September, 1882, the day commenced with a thick fog, wind south-west, light breezes; at 1 o'clock the fog lifted, and the *Emma K. Smalley* made Cape Spencer; she was then laid on a course east by south, and so continued up to 8 p. m.; the fog shut in very thick, with smoke, as night came on; took in topsail and furled outer jib. At 8 p. m., the course was changed to east, and vessel kept on starboard tack, heading east, and going through the water at the rate of not more than three knots an hour, the tide running to the westward about two knots an hour. That at 8 p. m. the blasts of the fog-horn were changed from one to three blasts, and

kept constantly going at intervals of not less than a minute up to the time of the collision, three blasts being blown each time. That a sharp lookout was also kept, and there were on deck at the time of and previous to the collision, the captain, mate, cook and a seaman. That for some time previous to, and at the time of the collision, the fog was very thick, with smoke, so that it was impossible to see far ahead. That about 9 p. m. the wind was about south south-west, and those on board the Emma K. Smalley heard some one on another vessel, which afterwards turned out to be the Vesta, calling out "Hard up, you are coming into us," or something to that effect, which order was obeyed by the Emma K. Smalley, and almost immediately afterwards the Emma K. Smalley fouled with the Vesta about her main rigging.

The Emma K. Smalley denies in her reply that she was seen four hundred yards off by the Vesta, and sets up that the Vesta did not keep her fog-horn going constantly, and it is denied that, by the exercise of ordinary care and seamanship on the part of the crew of the Emma K. Smalley, that they could have avoided the collision. The reply also alleges that the persons on board the Emma K. Smalley did not hear any fog-horn previous to the collision, and that no fog-horn was blown on board the Vesta, or if blown was not blown loud enough to be heard a proper distance, and was not blown at proper intervals; and further, that the Vesta was not provided with such a fog-horn as is required by the regulations for preventing collisions at sea. They further allege that the lights of the Emma K. Smalley were large, and could be seen through a thick fog a greater distance than those of the Vesta, and that the lights of the Vesta were not according to the regulations.

I am of opinion, from the evidence and conduct of the persons on board both vessels, that the weather on the night of the 3rd September, 1882, was dark and foggy. Both parties, in their pleading and evidence, say that for some time before and up to the time of the collision they kept their fog-horns going. In such weather it was, therefore, the duty of the master of each vessel to exercise the utmost vigilance, and to adopt the best means in his power to avoid

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any collision. The Emma K. Smalley, being a vessel running free, was bound to keep out of the way of the other. It is urged and pressed on her part that she kept a good lookout; that she was proceeding at moderate speed, and sounding her fog signal at proper intervals; that she heard no fog signals except her own; and that it was impossible, by reason of the foginess of the night, to discern the Vesta, which was deeply laden, until the collision was inevitable. The master says: "I was on a lookout, and on the quarter deck, walking from one side to the other, and the mate was on the forecastle deck. I could not see the Vesta until she struck us." The mate says: "I was on the forecastle deck keeping a sharp lookout. Moran was at the wheel, and Nelson was forward on deck. The fog and smoke at the time of the collision was so thick that you could not see the length of the vessel." The nautical assessor with me in the case advises me that the speed of both vessels was moderate; that the Vesta was not seen by the Emma K. Smalley until the collision was inevitable; and that the failure of the Smalley to discern the Vesta sooner was owing to the fog and the absence of any warning that the Vesta was approaching; that although a fog-horn may have been blown on board of the Vesta, as stated by her mate, yet that it was not heard by the Smalley, which was to windward. The assessor is also of opinion that a proper lookout was kept on board the Emma K. Smalley, and that had she received warning of the approach of the Vesta in a reasonable time she might have avoided her, and, therefore, that no blame attaches to the Emma K. Smalley. Concurring with the opinion of the nautical assessor, I pronounce against the damages sued for.

An important question upon the promovent's pleading has been raised by the respondent's counsel, viz.: that the case of the plaintiffs, as made out by their evidence, was entirely at variance with that set up by the plaintiffs' libel, and that the plaintiffs could not recover, as their proofs were not according to their allegations. Cases in the Admiralty Court have been cited, which establish that the Court must not allow the party proceeding to recover, if he fails to prove

the case set up in his pleadings, although no fault be proved against his vessel and fault is established against the other vessel. The petition or libel of the plaintiff should set out all the facts upon which he rests his case, and a plaintiff who fails to establish his case so set up, will not be allowed to take the benefit of another state of facts, although he may establish upon such facts a perfectly good case.

In the case of *The Ann* (1), where the plaintiff pleaded that the collision was wholly caused by defendant's vessel starboarding, the Court of Appeal was of opinion that plaintiff was on the true state of the facts entitled to recover. Yet they held, nevertheless, that he was barred from recovering, because the starboarding of defendant's vessel was not proved. The plaintiffs put their case in the libel, entirely upon the ground of *The Ann* having suddenly and improperly starboarded, and they said the damage was solely imputable to that act, and they failed to prove their allegation by the evidence; so in the present case, the plaintiffs allege that the *Vesta* sighted the *Emma K. Smalley* running free before the wind, and heading about north-east, and that the *Emma K. Smalley* was then at a sufficient distance from the *Vesta*, by the exercise of ordinary care and seamanship, to have avoided the collision, but that the said *Emma K. Smalley* improperly and wrongfully held on her said course and ran directly into the *Vesta*, striking her about the starboard main chains and cutting her down to the water-way.

The evidence of the captain of the *Vesta* disproves the allegation of the libel. He says: "The collision was occasioned by the *Smalley's* undertaking to cross my bow. When I first looked out of the cabin window I saw both of the lights of the *Smalley* and her sails, and when I got on deck I could only see the red light of her port side, showing that she was attempting to cross my bow." Again he says: "As I have before stated, the *Smalley* was running the course of the bay up, right clear before the wind, and if he had let her go on her course she would not have touched us."

The evidence of the mate of the *Vesta* is to the same effect. He says: "I was keeping a good lookout; shortly

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(1) 13 Moore P. C. 198.

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I saw two lights, both of the approaching vessel. I apprehended no danger, and the Smalley luffed right to shut her green light out. The Smalley, instead of keeping off, luffed, and undertook to cross our bow and came into us." The evidence of Bellivcau, the steersman, is to the same effect.

The fault, therefore, which is imputed in plaintiff's libel to the Emma K. Smalley, is that she wrongfully kept on her course and caused the collision, whereas, by the evidence of the plaintiff, it is set up that the Smalley would have avoided the collision had she kept her course, but that she suddenly luffed up, shut in her green light, and so caused the collision. The evidence, therefore, is in conflict and not reconcilable with plaintiff's libel.

For the reasons before given, I am of the opinion that the collision was one of those accidents of navigation which no ordinary care or seamanship on the part of the Smalley could prevent.

Plaintiff's case dismissed, but without costs to either party.

Decree accordingly.

For notes to cases on collision at sea see *ante*, p. 24 and p. 78. It will be noted that *The Love Bird*, 6 P. D. 80 (1881) was pressed and relied on by respondent's counsel in the principal case. It is submitted the cases of *The Fanny M. Carvell*, 13 App. Cas. 455 n., and *The Duke of Buccleuch*, 15 P. D. 86 s. c. (1891) A. C. 310, must now be taken as the authoritative exposition of 36 & 37 Vic. c. 85, sec. 17.

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In the case of *The North American*, Swa. 358 s. c. 12 Moo. P. C. 331, it was held that a

party proceeding must recover *secundum allegata et probata*, if he recover at all; and that, therefore, in a case of collision, the party suing cannot recover in full if he fails to prove the case set up in his pleading and evidence, although no fault be proved against his vessel, and fault is established against the other vessel. This doctrine was confirmed and extended in *The Ann*, Lush. 55 s. c. 13 Moo. P. C. 198. This was a case of collision in which the plaintiff alleged in his petition that the damage was caused by the defendant's vessel starboarding her

helm. It was held that the plaintiff, on the true state of facts, was entitled to recover, yet was barred from recovering because the starboarding of the defendant's vessel was not proved. Lord Chelmsford, delivering the judgment of the Privy Council, at p. 56 of the report in Lushington, says: "Now it is a rule, and a most important rule, to be observed in all courts, that a party complaining of an injury, and suing for redress, must recover only *secundum allegata et probata*. There is no hardship or injustice in adhering strictly to this rule against the complainant, for he knows the nature of the wrong for which he seeks a remedy, and can easily state it with precision and accuracy.— But great inconvenience would follow to the opposite party unless this strictness was required, because he might constantly be exposed to the disadvantage of

having prepared himself to meet one state of facts, and of finding himself suddenly and unexpectedly confronted by another totally different. The great object of all courts where trials of fact take place ought to be to bring the parties to a distinct agreement as to what is in contest between them, and this object would be entirely frustrated if it were competent to a party to place his right to redress on one ground and then to abandon it at the trial for another, although the latter ground would originally have given him a right to recover against the other party." The defendant may plead a particular fact, and is not concluded if he fails to prove it, but the plaintiff must establish his case according to his pleadings and evidence. *The East Lothian*, Lush. 241. See also a very valuable note on this subject in W. & Bruce (ed. 1886), p. 349, *et seq.*

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THE BORZONE—GOGORSO.

Necessaries—Wages—Priority of Claims.

A vessel having been arrested and sold under a decree of the Court for necessities, and the money brought into the registry,

Held:—That the seamen had a right to be paid before the plaintiff who had obtained the decree.

The Borzone, an Italian ship, about July, 1886, took on board at Chatham, N. B., a cargo of deals, bound for Marseilles, France. The vessel sailed for France from Chatham, aforesaid, in the month of July, but having been damaged by a storm shortly after sailing, was compelled to put back to Chatham for repairs. The cargo of deals was partly discharged on the wharf of Henry A. Muirhead, the plaintiff in this suit, and for which the captain of the vessel agreed to pay wharfage. A warrant was issued out of this Court in the month of September, 1886, at the suit of Muirhead in a cause for necessities supplied at the request of the master. The claim was made up of wharfage, surveys, and an account of \$700 held by George Watt, of Chatham, against the vessel for advances made at the captain's request, and which on the same request was paid by Muirhead. Prior to the arrest of the vessel in this suit the master had drawn a bill of exchange upon M. Gaillard, of Marseilles, and which was accepted by him, and paid for disbursements of the ship before her arrest. Upon the arrest of the vessel, the captain being wholly unable to raise funds to repair her or to discharge her liabilities, the plaintiff, the seamen, the mate, the master, and the holder of the bill of exchange claimed priority of payment. The several claimants applied to be allowed to intervene and become parties to the suit. This was refused, but on the suggestion of the judge, and the consent of parties, a decree of sale was made at the suit of Muirhead. The vessel was sold under the decree of the Court and the proceeds brought

into the registry to be paid out as the rights of the respective claimants might appear. The amount was insufficient to pay all claims in full.

C. A. Palmer, for the plaintiff in the suit for necessities, contended that the decree already obtained in favor of Muirhead should be paid first. He cited *Manfield v. Maitland* (1); *Hicks v. Shield* (2). Advance freight is not recoverable back. *Lowndes on Ins.*, secs. 29-32; *Maclachlan on Shipping*, 542. *The Karnak* (3).

C. W. Weldon, Q. C., for the holder of the bill of exchange, does not deny advance freight cannot be recovered back, but where, by the default of the shipowner, the contract is put an end to, not by perils of the sea, it is a rescission of the contract, and his client, having advanced the money to pay disbursements, is entitled to rank on the fund in Court. The vessel cannot now earn her freight, and the owners are responsible for the loss of freight. His client now stands in the same position as Mr. Watt and others who made advances. *The Markland* (4); *The Fairport* (5).

W. C. Winslow, for the master and seamen, contended that wages are a first claim, and must be paid before all others. Cites *The Madonna D'Ira* (6), where a Greek mariner was allowed subsistence money and means to return home. *The Jane* (7); *The San Jose Primeiro* (8). Foreign seamen, employed out and home again, are entitled to passage money to return home. *The Elizabeth* (9); *The Providence* (10). As to the case of the master, if he had known he was signing away his lien when he gave draft or ordered necessities, he would not have done so. *Kay on Shipping*, vol. 2, 1137. Seamen should have wages up to time of arrival home. This is laid down in *The Elizabeth*, *supra*, and the same applies to the master.

WATTERS, J. In this case the ship has been sold in a cause of necessities and the proceeds brought into the

(1) 4 B. & Ald. 582.

(2) 7 E. & B. 633.

(3) L. R. 2 A. & E. 289.

(4) L. R. 3 A. & E. 529.

(5) 8 P. D. 48.

(6) 1 Dods. 37.

(7) 1 Stuart 256.

(8) 3 L. T. 513.

(9) 2 Dods. 403.

(10) 1 Hag. 393.

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registry. Claims have been filed against the fund on behalf of the mariners for wages; by the master for wages and disbursements, and by M. Gaillard for the amount of a draft drawn upon him by the master on, and accepted and paid by the claimant for disbursements of the vessel prior to her arrest in this suit. The question has arisen as to the order in which claims and what claims shall be paid. I direct that the claimants on the fund in Court be paid out of the same, as far as it may be sufficient, in the following order:

1. On the authority of *The Immacolata Concezione* (1), the plaintiff's costs in this suit are ordered to be paid.

2. The wages of the seamen, including the mate, up to the date of the arrest of the ship, together with allowances of \$20 to each for return to their own country, with their costs.

3. The plaintiff's claim in this suit as decreed.

4. The master's wages and disbursements.

In this case, the master having ordered the necessities for which he was personally liable, and for the payment of which he subsequently signed papers pledging himself, ship and cargo for such payment, cannot claim a priority over the plaintiff's claim for his own wages and disbursements. The claim of M. Gaillard, even if it can be recognized as a claim for necessities, cannot compete with the claim of the plaintiff under his decree. The plaintiff has perfected his claim by action and decree, and therefore both are not in the same condition, and the plaintiff is entitled to priority.

Decree accordingly.

As to priority of liens it is laid down in Maclachlan on Ship. (ed. 1892) that "in relation to their objects, liens may be divided into two classes: First, liens in the nature of rewards for benefit conferred; secondly, liens in the nature of reparation for wrong done. Those of the former class generally rank against the fund in the inverse order of their attachment on the *res*; those of

(1) 9 P. D. 37.

the latter class in the direct order of their attachment on the *res*; and relatively to each other. Whilst liens of the one class when prior in date yield precedence in claim to those of the other class when subsequent, the actual result of this order of ranking is greatly modified by positive law and equitable considerations." The first class of liens comprises bottomry, wages, master's disbursements and salvage; the second, usually, damage by collision

In *The William F. Safford*, Lush. 69, which is a leading authority on this subject, it was held that seamen's wages took priority first of all; then a bottomry bond previously pronounced for, and given before the wages were earned. If a party, at the request of the master, pay the wages of the crew, his claim is deemed a wages' claim and ranks as such. A bottomry bond takes precedence of a claim for necessities previously pronounced for, the necessities having been supplied before the bond. In case of two or more claims for necessities, the one first obtaining a decree of the Court takes precedence of the others. The costs incident to the prosecution of the different claims have the same right of priority as the claims themselves. See *The Margaret*, 3 Hag. 240; *The Immacolata Concezione*, 9 P. D. 37. Dr. Lush-

ington, in *The Union*, Lush. 128, held that questions of precedence of liens upon ships are to be determined by the *lex fori*. At p. 137 he says: "Upon an examination of all the cases, and upon an investigation of the practice of the Court, I find that no distinction has ever been taken between wages earned before and wages earned after a bond; that in practice both have been alike preferred to the bond." In this case it is worthy of note that the learned judge overruled his previous decisions in *The Mary Ann*, L. R. 1 A. & E. 8; s. c. 9 Jur. 94; *The Janet Wilson*, Swa. 261; and *The Jonathan Goodhue*, *ibid*, 524. A foreign ship is not liable for money loaned to the master to get out of gaol, where he was imprisoned for a claim for necessities supplied to his ship. *The N. R. Gosfabrick*, Swa. 344. But it seems a person supplying necessities to a ship, and taking a bill of exchange for the same in payment, can, if the bill is not paid at maturity, sue the ship on the original debt, *ibid*. A master's wages and disbursements come next after the seamen's wages, and before other claims. *The Salacia*, Lush. 545, although he be a part owner, except, however, where, as master, he has made himself liable. His claim, therefore, gives way to bottomry when he has joined in the bond. *The Edward Oliver*, L. R. 1 A.

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& E. 379; or in a mortgage. *The Jenny Lind*, L. R. 3 A. & E. 532; or ordered necessities, *ibid.* The master's claim for disbursements has priority over that of a purchaser. *The Ringdove*, 11 P. D. 121. This latter case was reversed in the House of Lords in *The Sara*, 14 App. Cas. 209, but by the Merchant Shipping Act, 1889, 52-53 Vict. c. 46, the law was brought back to what it was taken to be before the judgment of the Lords in the latter case. See *ante*, p. 85.

Among claims of equal standing, as stated, a preference will be given to the one first obtaining a judgment. Dr. Lushington, in *The William F. Safford*, *supra*, p. 71, said: "The Court encourages sailors in actively enforcing their remedy, and gives preference to the party who is first in possession of a decree of the Court." Hence it was held in *The Clara*, Swa. 1, that of two plaintiffs in a cause of damage by collision, the one obtaining the first decree takes precedence. The same doctrine was laid down in *The Desdmona*, *ibid.*, 158, but in the latter case, as there had only been an interlocutory and not a final decree, all the claimants for necessities came in on equal terms. See also *The Saracen*, 2 W. Rob. 451; s. c. 6 Moo. P. C. 56. See for a further statement of the law on the question of priority of liens Maclachlan on Ship. (ed. 1892),

p. 739; W. & Bruce (ed. 1886), 204.

In Roscoe, Ad. Prac., p. 62, it is said to be an invariable rule that claims against the *res* rank in the inverse order of their attachment: the last in time is the first to be satisfied. The following is the order of priority: (1) Salvage of life. Mer. Shipping Act, 1854, sec. 459; *The Coromandel*, Swa. 205; *The Cargo res Schiller*, 2 P. D. 145. (2) Salvage of property. *The Gustaf*, Lush. 506, s. c. 31 L. J. Ad. 207, in which the possessory lien of a shipwright gave way to maritime liens attaching to the ship at the time of going into his hands. (3) Claims for damage. *The Linda Flor*, Swa. 309, where damage by collision took precedence of the seamen's wages on a foreign ship. (4) Wages and disbursements of seamen and master. *The Feronia*, L. R. 2 A. & E. 65; s. c. 37 L. J. Ad. 60, where the master, although a part owner, for wages and disbursements was given priority of the claims of mortgagees in possession. *The Union*, Lush. 128; s. c. 30 L. J. Ad. 17, under which seamen's wages earned before the giving of bottomry were preferred to the bond. To the same effect see *The Daring*, L. R. 2 A. & E. 260. (5) Bottomry. *The Cargo ex Galam*, Br. & Lush. 167. The freight in this case was considered as in the nature of

salvage, and on this ground was preferred to the bond. (6) Mortgage. *The Two Ellens*, L. R. 4 P. C. 160; s. c. 41 L. J. Ad. 33, where the assignee of the mortgage took precedence of the material man. (7) Necessaries so far as regards British ships, *ibid.* But if a master is also part owner of a foreign ship, his claim for wages and disbursements, contrary to the general rule, will rank after claims for necessities supplied to the ship on the order of the master, and for which he is liable. *The Jenny Lind*, L. R.

3 A. & E. 529. The claim of a master for his wages earned and disbursements made subsequently to a voyage, during which a bottomry bond has been given on his ship, takes priority over the bond, but the claim of the bondholder takes priority over the claim of the master for wages earned on voyages previous to that during which the bond is given. *The Hope*, 28 L. T. N. S. 287; s. c. 1 Asp. 563. The master's claim for wages and disbursements, whenever earned or made, have priority over the claims of mortgagees, *ibid.*

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Oct. 10.

THE MISTLETOE—CORNING.

Wages—Master—Forfeiture—Authority to Bind Owners—Costs—Security for.

The ship *M.* arrived in Liverpool, England, with a cargo consigned to parties there, with instructions to the master by the owners for their agents to collect inward freight and transact the ship's business. The agents purchased an outward cargo of coals for St. John, N. B., and informed the master it was on ship's account. By request of the agents, the master signed a draft for payment of cargo, although the owners, but unknown to the master, had sent the agents funds for the coals. The agents shortly after became insolvent.

Held:—In an action by the master for his wages, that the owners could not charge the draft against the master, and that he was entitled to recover his full wages with costs.

The plaintiff in this suit, Thomas H. Corning, instituted a cause of subtraction of wages as master of the ship *Mistletoe*. The managing owner, H. D. Troop, resided at St. John, N. B. The vessel sailed from Manila with a cargo of hemp and sugar consigned to parties in Liverpool, Great Britain, where she arrived in January, 1887. The plaintiff, as master, was instructed by the owners to report the ship on arrival to T. C. Jones & Co., ship brokers, of that place, and the inward freight, under like instructions, was received by Jones & Co., who also transacted the business of the vessel while in Liverpool. After delivery of the inward cargo to the consignees, the master in his evidence stated (and it was not contradicted) that he consulted with Jones & Co. as to the outward cargo—that he sent a cablegram to the managing owner at St. John, N. B., as to the outward cargo. Subsequently one of the firm of Jones & Co. informed the master that he had received directions from the managing owner to purchase a cargo of coals for the vessel and send her to St. John. No instructions were received by the master from the owners as to the cargo. The vessel was accordingly loaded with coals purchased by Jones & Co., and, as the master understood from them, on ship's account. The day before the vessel sailed from Liverpool for St. John

with the coals, Jones & Co. requested the master to sign a draft—a copy of which is set out in the judgment of the Court—to pay for the cargo, which they told him had been purchased on ship's account. He signed the draft, as requested. The owners, it appeared on the trial, had sent Jones & Co a draft for £300 to pay for the cargo, but this fact was not known to the master. Jones & Co. shortly after became insolvent, and the draft signed and given them by the master was paid by the owners of the ship through the managing owner, who was arrested for it in Liverpool, and allowed judgment to go by default. The defendants filed a counter-claim against the plaintiff for the amount of the draft he had signed, and certain expenses connected therewith, and on the trial insisted that the amount should be charged by way of set-off against the master. The defendants also contended that they only purchased the cargo for a coal merchant at St. John, receiving a certain freight per ton, and that the cargo could not therefore be considered as on ship's account. The contention of the defendants, however, was rejected by the Court, and judgment was given in favor of the master for the full amount of his claim, \$634.08, and with costs. A point of practice of considerable importance as to giving security for costs, on the part of the plaintiff, arose during the pendency of the suit. Plaintiff's counsel, on September 8, 1887, on motion asked that a day be fixed for the hearing of the cause, and the judge fixed October 3, 1887, as the time for hearing. The defendants, on September 10, 1887, filed in the registry a notice of motion for September 12, 1887, supported by affidavits, calling upon the plaintiff to show cause before the judge in Chambers, on the last named date, why he should not give security for the costs of suit, on the ground that the plaintiff resided at Yarmouth, N. S., outside the jurisdiction of the Court. This motion was opposed by the plaintiff on the ground set forth in his affidavit filed—that he was a stranger in the province and could get no one to go his security; that ever since the commencement of the action he had been a resident of the province, with the exception of a few days, and that he intended to continue a resident

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until the suit was determined. The judge refused the application for security for costs.

John Kerr for the plaintiff.

C. A. Palmer for the vessel and owners.

The following judgment was delivered by

WATERS, J. This is a suit brought by the master of the Mistletoe for wages and disbursements in which plaintiff claims a balance of \$634.08. The claim is opposed by the owners of the ship who have appeared to the action, who set up against plaintiff's claim the amount of a bill of exchange given by plaintiff to T. C. Jones & Co., of Liverpool, without instructions from owners, and for which judgment has been recovered at Liverpool by the holders, the Lancashire Colliery Association, whereby the owners allege they have suffered loss and damage.

On the hearing it appeared that the ship of which plaintiff was master arrived at Liverpool from Manila with a cargo of hemp and sugar; that Messrs. T. C. Jones & Co., of Liverpool, under instructions from the owners at St. John, to whom plaintiff was directed to report the ship, looked after the business of the ship at Liverpool, and collected and received the inward freight; that whilst at Liverpool, Messrs. Jones & Co., under instructions from the owners, purchased a cargo of coals, with which the ship was loaded and sent to the owners at St. John.

No correspondence passed between the plaintiff and the owners whilst the ship was at Liverpool, the business of the ship being attended to by Messrs. Jones & Co. On the 10th February, 1887, after the ship was loaded, and the day before she sailed for St. John, Jones & Co. presented to the plaintiff for his signature the following draft, which plaintiff signed and left with Jones & Co.:

£319 17s. 9d.

LIVERPOOL, 10th February, 1887.

Forty-five days after date pay to the order of the Lancashire Colliery Association (limited) three hundred and nineteen pounds, seventeen shillings and ninepence, value received in cargo coals per bark Mistletoe.

(Signed)

T. H. CORNING,

Master.

To Messrs. T. C. Jones & Co.,

30 Chapel street, Liverpool.

The defendants contend that the plaintiff has forfeited all claim to his wages by his signing this draft without any authority or instructions from them, and by his neglect and omission to notify the owners concerning said draft, etc. It appears that before the owners had any knowledge of the draft they had placed funds in the hands of T. C. Jones & Co. to pay for the coals, which Jones & Co. failed to pay over, and that the draft came to the hands of the vendors of the coal, who have instituted proceedings against the owners of the ship upon it. As to the law on this subject, in *Maud & Pollock*, vol. 1, it is said: "As the consideration for the master's wages is the performance of his duty, if he is guilty of any gross misconduct, as barratry or habitual drunkenness, or if he exhibit gross incapacity, it seems that an entire forfeiture of his wages will ensue; but circumstances seldom occur to call for the enforcement of this extreme rule, and when the master, by his neglect or misconduct, has occasioned loss to the owners of the ship, he is liable to compensate them for such loss, and in a suit for wages instituted by the master, the owners may claim to deduct from his wages the amount of such loss."

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In considering the acts of the master, it must be remembered that nothing more can be required from him than the honest exercise of his own discretion, according to the degree of ability and experience in business which such an officer may fairly be supposed to possess, and that a mere error of judgment on his part, free from guilty intention or corrupt motive, cannot be regarded as neglect or misconduct.

In the case of *The Thomas Worthington* (1), where the master's claim for wages was opposed by the assignee of the owner on the ground that the master had forfeited his wages by wilful departure from the instructions and by collusion with the agent in a foreign port, it was held that conduct merely erroneous and not tainted with guilty intention will not work a forfeiture of wages, and that more is not required of a master than the honest exercise of a sound discretion proportioned to the degree of ability and knowledge of business which a master may be fairly supposed to possess.

(1) 3 W. Rob. 128.

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In the case of *The Camilla* (1), it was held that neither error of judgment or seamanship, nor neglect to communicate to Lloyd's agent the stranding of the vessel, nor neglect to sign a bottomry bond, works a forfeiture of wages.

The case of *The Sir Charles Napier* (2), cited by Mr. Palmer, the defence was that the master had so neglected his duty as master of said vessel, and conducted himself so negligently, that by his negligence the ship was wrecked and totally lost, but the case was decided on other grounds raised on the pleadings.

In the present case the business of the ship at Liverpool was, by the instructions of the managing owner, placed in the hands of T. C. Jones & Co., who were also directed to purchase a cargo of coal, which they did, and, as plaintiff swears, informed him that the coal had been bought on ship's account. The plaintiff, just before sailing, signed the draft for the price of the coal, the draft being drawn on Jones & Co. in favor of the vendors of the coal; the plaintiff appears to have done this in good faith, believing, as he swears, that it was his duty to do it.

No wilful neglect, corrupt motives, or collusion with the ship's agents are charged against him, and I certainly cannot, under the evidence, impute any such misconduct to him; first, because he signed the draft by the direction of the ship's agents; secondly, because he believed at the time of signing the draft that the coals had been purchased on the ship's account; and, thirdly, because he had the coals then actually on board of the ship. And neither does blame attach to plaintiff for not communicating to the owners the fact that he had signed the draft, that being the duty of the ship's agents when reporting to the owners their dealings and transactions for the ship.

For these reasons I pronounce for the plaintiff's claim, and with costs, and assess the damages at \$634.08.

Decree accordingly.

(1) Swa. 312.

(2) 5 P. D. 73.

FORFEITURE OF WAGES.

Misconduct to work a forfeiture of wages must be continuous and of a very gross character. See *W. & Br.* (ed. 1886), 196. In a mate's suit for wages, the defence was that he had been discharged for misconduct, alleging drunkenness and incapacity, but the wages were decreed. *The Exeter*, 2 C. Rob. 261 (1799). It was held in *The Lady Campbell*, 2 Hag. 5 (1826), that occasional acts of drunkenness, not more than usual with sailors, and latterly (when more frequent) arising from the undue force given to bodily disease to the moderate use of strong liquors, will not cause a forfeiture of the steward's wages. The Court draws a strong line of distinction between misconduct in port and during the voyage. *The Blake*, 1 W. Rob. 73 (1839). Mere error of judgment on the master's part in managing the business of the ship in a foreign port, without corrupt intent or wilful disobedience of orders, will not *per se* entail forfeiture of wages, even though losses are occasioned thereby. *The Thomas Worthington*, 3 W. Rob. 128. In the same manner neither error of seamanship in the master, nor neglect to communicate to a Lloyd's agent the stranding of the vessel, nor to sign a bottomry bond, will work a forfeiture. If the master, engaged for a voy-

age out and back, is wrongfully dismissed abroad, he is entitled to wages until he can get other employment. *The Camilla*, Swa. 312 (1858). The cost of a seaman's maintenance after the commencement of a suit is recovered as costs in the cause. *The Carolina*, 34 L. T. N. S. 399.

The master does not forfeit his wages by occasional drunkenness, nor by mere errors of judgment in the performance of his duty. *The Atlantic*, Lush. 566 (1862). It was held he was entitled, under the Mer. Ship. Act. 1854, c. 104, ss. 187 and 191, to double pay for the number of days, not exceeding ten, for which his wages were improperly withheld, and this although the wages were withheld on the ground that the master had not paid over certain salvage money in his hands. *The Princess Helena*, Lush. 190; but this was overruled in *The Arina*, 12 P. D. 118. A master, however, who has been habitually drunk during his employment cannot maintain an action for wages. *The Macleod*, 5 P. D. 254. See also *The Roebuck*, 31 L. T. N. S. 283; s. c. 2 Asp. N. S. 387. If a seaman is wrongfully discharged before his term of engagement has expired the Court of Admiralty has jurisdiction to entertain a claim for compensation in the nature of damages. *The Great Eastern*, L. R. 1 A. & E. 384. See *Guilford v. Anglo-*

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1887 *French Steamship Co. of Canada*,
 9 Can. S. C. R. 303. See note to
 THE *The Plover*, next case, *post* p. 129,
 MISTLETOE. for cases in which the master
 continues to hold his lien on the
 ship for wages and disburse-
 ments, although promissory note
 or bill of exchange taken.

SECURITY FOR COSTS.

The Court of Admiralty has the power to compel security for costs to be given by plaintiff to defendant. It exercises such power upon the same occasions as the other Courts. Coote Ad. Prac. 38. A defendant putting in a counter-claim may also be compelled to give security for costs if resident out of the jurisdiction. W. & Br. (ed. 1886), 482. There must be a special reason for the order. *The Minerva*, 1 W. Rob., p. 172. The application should be made at the earliest stage of the proceedings. *The Volant*, 1 W. Rob. 384. In *The Conon*, 6 Jur. 351, Dr. Lushington said: "In these applications for costs the rule ought to be strictly observed that they be made at the commencement of the suit. It

is contrary to every principle of practice, and not very consistent with justice, that these applications should be made after the cause has proceeded some way and the result can be descried." In the case of *The Friendship*, Tuck, J., in New Brunswick, August 4, 1893, dismissed with costs, such costs to be costs in the cause, an application to compel the plaintiff, a foreigner, residing out of the jurisdiction, to give security for costs, on the ground that the application should have been made earlier. It was a case of damage by collision, in which, prior to the application, the plaintiff had filed notice of trial, and had moved to open the preliminary acts, and in which, on the application of the defendant, a commission to take evidence abroad had been ordered. Where defendant, a foreigner, put in a counter-claim and was ordered to give security for costs, and had not given the security, his claim at the hearing was dismissed. *The Julia Fisher*, 2 P. D. 115. See also *The Newbattle*, 10 P. D. 33.

THE PLOVER—CROSSLEY.

1887

Nov. 1.

*Master—Wages and Disbursements—Taking Promissory Note—Lien on Ship—
Not Waived.*

The plaintiff brought an action against the P. for wages and disbursements as master of the vessel. In answer to the master's request when abroad for a statement of his account and for payment, the managing owner sent the master his individual promissory note for \$800, payable with interest, on account of the wages. The managing owner subsequently became insolvent. The master, on his return to St. John, N. B., demanded payment from the owners of his wages and disbursements, the sum claimed including the amount of the promissory note. The owners, by their counter-claim, sought to set-off against the master's claim, among other things, the amount of the promissory note; but

Held:— That the master, under the circumstances of the case, had not lost his lien upon the vessel. The set-off was rejected, and the plaintiff held entitled to recover, with costs.

This was a cause of subtraction of wages and disbursements instituted by James H. Crossley, as master, against the Canadian registered vessel Plover. It appeared by the evidence that the master was put in charge of the vessel in the year 1883, and continued in charge until August, 1887. During the greater part of his employment he was on distant voyages, and for a portion of that time his wife and child sailed with him in the vessel. The defendants put in a counter-claim composed of several items, the principal of which, however, were for failure of the master to collect ten days' demurrage under charter party in 1883, at Carnarvon; for board and expenses of the master's wife and child while on board; and for a promissory note for \$800, payable with interest, made by Mr. S. Schofield, the managing owner, in favor of the master, and by him sent to the master. It appeared that the master, as early as 1884, and repeatedly afterward, had sent requests to the managing owner at St. John, N. B., for statements of his account and urging payment. It also appeared that the managing owner, on one occasion, had written the master that interest would be allowed him on any money due and undrawn. In reply to

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one of the requests of the master, then abroad, for an account and payment of his claim, Mr. Schofield sent him his individual promissory note, payable with interest, dated July 1, 1885. Subsequently to giving the promissory note the managing owner became insolvent. Upon the return of the master to St. John, N. B., in August, 1887, he demanded from the owners the amount of his wages and disbursements, and threatened legal proceedings if not paid. At the trial the managing owner testified that, pending negotiations for a settlement, and prior to the commencement of this suit, he said to the master, "You know you have no claim against the owners or vessel for that \$800," to which the master replied, "I know that; I took you for that." Failing to get a settlement, the master began this suit and caused the arrest of the vessel. Several shipowners and managers of vessels gave evidence as to the custom of charging expenses against the master when his wife sailed with him. From the evidence it appeared there was no settled or uniform custom. Some managing owners charged a certain amount, and some charged nothing. It was generally a question of agreement between the parties. There was evidence in this case that the cost to the ship would be about \$5 per month for each person. Counsel for the master did not strongly resist the right of the owners to be allowed a reasonable sum, as the master had expressed a willingness to be charged what was a reasonable amount. The Court therefore allowed \$5 per month each for wife and child during the time on board. The counter-claim for demurrage was ignored, and it was held that the master had not forfeited his lien on the vessel by taking the promissory note. Judgment was therefore given in favor of the master for the amount of his claim, with costs, less the charges for his wife and child, and one or two other small items.

W. W. Allen, for plaintiff, admits the claim should be reduced by the amount of a railway ticket and a reasonable allowance for wife's board. The promissory note was not, however, payment, simply a statement showing the amount owing the master at that time. *Shute v. Robins* (1). There

(1) 3 C. & P. 80.

is no evidence that Mr. Schofield ever charged the promissory note against the owners.

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The reply of plaintiff to Schofield, as detailed by the latter, could not cut down any rights then held by the master. The demurrage cannot be charged against the master; it is a question of law for the judge to decide.

C. W. Weldon, Q. C., on the same side, refers to *The Fairport* (1), where a master gave a bill of exchange for disbursements of ship, it was not paid, judgment was signed against the master, and although unsatisfied, the master was allowed to proceed against the ship for the amount. The master has a lien on the vessel for his wages and disbursements. See R. S. Can. c. 74, s. 59. The plaintiff's lien is not lost. The lien also exists for the interest, as that is allowed in Admiralty. Mr. Schofield, as managing owner, was acting for the owners, and his acts would bind them. The Court, in adjustment of the accounts, can appropriate payments as justice may require. The note is not payment, only a suspension of payment. By special agreement parties can make it a payment, but that must clearly appear. The owners' liability continues unless they show to the contrary. The case of *The Fairport* shows lien is not lost. Also cites *The Rainbow* (2). Mew's Ann. Dig. for 1885, p. 443. If not given for a settlement, why does Schofield say it was a payment, while at same time owners say master is indebted for demurrage? Making deductions now claimed by defendants, the captain, at the time note given, was not entitled to \$800. In all the cases reported depriving master of lien, a settlement had been made. The Court must look at all the circumstances.

C. A. Palmer, for the owners of the vessel, cites W. & Bruce, p. 207. *The Petunia* and *The Rainbow* (3). A seaman who consents to the deposit of his wages at interest, instead of receiving them when due, loses his right to proceed against the ship. It was agreed the \$800 note should remain at interest in the hands of Schofield. He admits taking a bill of exchange for a debt is not payment of itself,

(1) 8 P. D. 48.

(2) 53 L. T. N. S. 91.

(3) 53 L. T. N. S. 91.

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but in this case the master dealt with Schofield as his banker. At the time the note was given the credit of the latter was good. To allow a lien now against the vessel for that sum might work injustice to innocent owners. The plaintiff, in August, 1887, knew of Schofield's suspension, and he then made no claim for the \$800 against the owners. The note transaction was purely between the master and Schofield. The master made numerous remittances to Schofield on account of ship after note was given, which he would not have done had he considered the \$800 note an item of claim against the ship. No interest can be recovered; the managing owner has no right to bind owners for such payment. The master should be charged with the demurrage, which he should have collected, and the board of his wife must be deducted from his claim.

Weldon, Q. C., in reply.

WATERS, J. There is no doubt but that the taking a promissory note or bill of exchange in satisfaction of a lien will in general determine the lien. Whether certain facts make out an understanding between parties that a particular transaction shall settle a demand is not a question of law; such payment is a question of fact.

The giving of a promissory note of a debtor for a pre-existing debt secured by a mortgage is only presumptive evidence of payment, and it is a question for the jury, upon all the evidence in the case, whether the note was given and received in payment of the mortgage debt. *Dodge v. Emerson* (1). The mariner's contracts (whether seaman or master) is a maritime service, and both are presumed in law to engage on the credit of the ship; therefore the maritime law gives a lien against the ship. *Dixon Ship*. 318-22, and before a seaman can be deprived of such lien by any alleged circumstance or transaction, both the American and English authorities hold that the onus is upon the defendants to clearly prove that there was an express arrangement with the mariner to forego his right against the ship. *The Rainbow* (2). The evidence of the plaintiff and the managing

(1) 131 Mass. 467.

(2) 53 L. T. N. S. 91.

owner do not agree as to the inception of the promissory note sent by Mr. Schofield to the plaintiff. The plaintiff says: "I wrote to Mr. Schofield for my account and received a letter to send my account and he would pay it. I did so, and in reply I received this note." Mr. Schofield says he is unable to produce plaintiff's letter to him, but that in it plaintiff requested him (Mr. S.) to send him his note for \$800, payable with interest, for his wages in *The Plover*.

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Now it must be remembered that Mr. Schofield was the managing owner of *The Plover*, and that all instructions came from him, and all correspondence was held between him and the plaintiff. The plaintiff joined *The Plover* in September, 1883, and early in 1884 commenced writing Mr. Schofield for a statement of his account. In May, 1884, Mr. Schofield wrote the plaintiff that he would allow him interest on any balance due. Up to July 1, 1885, no statement of account had been sent by Mr. Schofield to the plaintiff, when plaintiff says he applied for his account and payment, so that, so far as this part of the evidence goes, up to the time the note was sent, no arrangement or agreement had taken place between them for the acceptance by plaintiff of Mr. Schofield's note in payment and satisfaction of his right then existing against the vessel. Was this of itself anything more than an acknowledgment of the indebtedness with interest to be added?

Mr. Schofield had himself proposed, as we have seen, as early as May, 1884, to allow interest. This was made not in compensation for the waiver by plaintiff of his lien against the ship, but doubtless to satisfy plaintiff, who was calling for statements of his account. If, then, the sending and receipt of Mr. Schofield's note did not in law or in fact amount to an abandonment of plaintiff's lien, what subsequent arrangement was made to deprive him of his right? On consideration I can find none. It nowhere appears that plaintiff, in writing to Mr. Schofield, dealt with or treated him as other than the representative of the vessel. Plaintiff's reply, at the time these proceedings were threatened, to Mr. Schofield's remark, "You know you have no claim against the owners or vessel for that \$800," to which he said,

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"I know that, I took you for that," cannot, I think, unsupported by any prior agreement or arrangement to that purpose with Mr. Schofield, have the effect now contended for.

I therefore find the amount of the master's wages and disbursements to be \$2,057.46, from which I deduct \$6 for railway ticket given the master's wife, and \$526.66, amount allowed for board of wife and child during the time they were on board the ship, being \$10 per month for the two, leaving a balance of \$1,724.80 due the plaintiff, for which I pronounce, and with costs.

Decree accordingly.

For cases as to forfeiture of wages, see note to *The Mistletoe*, ante, p. 127.

ENGLISH CASES.

A maritime lien is a right to enforce by action in the Admiralty Court a claim against the *res*. It exists in the case of bottomry, *The Royal Arch*, Swa. 269; *The Druid*, 1 W. Rob, p. 399; claims for salvage, *The Gustaf*, Lush. 506; damage by collision, *The Bold Buccleugh*, 7 Moo. P. C. 267, s. c. 22 Eng. L. & Eq. p. 69; *The Charles Amelia*, L. R. 2 A. & E. 330; for wages of seamen and master, *The Neptune*, 1 Hag. at p. 238; 52 & 53 Vict., c. 46, sec. 1; *The Castle-gate* (1893), A. C. 38. Material men or those who have supplied necessities have no maritime lien on the ship. *The Heinrich Bjorn*, 11 App. Cas. 270; but by 3 & 4 Vict., c. 65, sec. 6, they can proceed *in rem* against the ship. For the distinction between a

maritime lien and the right of material men to proceed *in rem* against the vessel see the last cited case as reported in 10 P. D. at p. 54. In *The Mellona*, 3 W. Rob., p. 21, it is laid down, "The position of a creditor who has a proper maritime lien differs from that of a creditor in an unsecured claim in this respect, that the former, unless he has forfeited the right by his own laches, can proceed against the ship notwithstanding any change in her ownership, whereas the latter cannot have an action *in rem* unless at the time of the institution the *res* is the property of his debtor."

In *The Bold Buccleugh*, *supra*, it is said "by the civil law a maritime lien does not include or require possession, but being the foundation of proceedings *in rem* (a process requisite only to perfect a right inchoate from the moment the lien attaches), such lien travels with the thing into whosoever possession it may

come, and when carried into effect by a proceeding *in rem*, relates back to the period when it first attached; the steamer was liable for the damages committed by her, though in the hands of a purchaser without notice of the damage, or the proceedings instituted against her.

It seems such lien arising out of damage is not indelible, but may be lost by negligence or delay, where the rights of third parties are compromised."

At common law what is called a "lien" is more strictly construed, and only exists when the thing is in actual or constructive possession. Taking a bill of exchange or promissory note *in satisfaction* will in general determine a lien—so where a vendor takes a note and negotiates it. *Horncastle v. Farran*, 3 B. & Ald. 497; but a vendor does not lose his lien on his estate sold, by taking a note and receiving its amount by discount, *ex p. Loaring*, 2 Rose, 79. Taking a note for rent does not preclude right to distrain even before the note falls due. *Davis v. Gyde*, 2 Ad. & E. 623. Solicitors lose their lien by taking security from their clients. *Bissill v. Bradford and District Tramways Co.* (1893), W.N. 44. Where a seaman, who has been tendered his wages in full, prefers a bill of exchange on the owners for his own accommodation, loses his lien on the ship and his right to sue in the

Admiralty upon the insolvency of the owners, and non-payment of the bill. *The William Money*, 2 Hag. 136. But when a master took a bill of exchange for wages and disbursements, the bill being dishonored, he is permitted to proceed against the vessel. *The Simla*, 15 Jur. 865; *Strong v. Hart*, 6 B. & C. 160.

A master who, after receiving a portion of his wages from the managing owners, elects to allow the balance to remain in their hands at interest, by so doing loses his lien, and cannot recover the balance *in rem*, but if he has had no opportunity of receiving his wages, or has been refused payment of them on demand, the mere fact of his allowing them to remain in the managing owners' hands after they become due will not deprive him of his remedy. *The Rainbow*, 53 L. T. N. S. 91.

Where shipowners, in answer to a claim for wages, plead an agreement between the managing owners and the plaintiff that the plaintiff shall, instead of receiving his wages, allow it to remain in the hands of the managing owners, and has thereby foregone his right against the ship, the onus is upon the defendants to clearly prove that there was an express arrangement to that effect before the Court will deprive the plaintiff of his right. Under the provisions of sec. 187 of the Merchant Shipping Act, 1854, and sec. 4 of the Seaman's Act, 1880,

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as to the non-payment of wages, the right to recover ten days' double pay and wages to the time of final settlement, is not enforceable where there is a *bona fide* question as to liability. *The Rainbow*, 53 L. T. N. S. 91. It has been decided in *The Arina*, 12 P. D. 118, that a master is not entitled to double pay for delay in paying his wages. The master is not deprived of his lien for wages and disbursements by the fact that he has taken a mortgage on the ship for the balance of his wages and disbursements, more especially if the shipowner has concealed from him the fact that there was a prior mortgage. *The Albion*, 27 L. T. N. S. 723. A master being compelled by pressing necessity of ill-health to leave his ship abroad, is entitled to sue at once for his wages. *The Rajah of Cochin*, Swa. 473; a release by the master of his personal claim against the shipowner for wages does not operate as a release of the vessel from his lien for wages. *The Chieftain*, Br. & Lush. 212.

AMERICAN CASES.

The American authorities adopt the same view as the English Court of Admiralty. In the case of *The Eastern Star*, 1 Ware 184 (1830), it was held that the seaman does not lose his lien on the vessel for his wages by taking an order on the owner or charterers for the balance due at the

end of the voyage. Ware, J., says: "In this case there was no offer of money, but when the men called on the master for their pay he drew an order on the owner. Even if he had made the draft payable to order I should have hesitated long before holding it to be a discharge of the wages. They were merely memos showing to the merchant the balance of money due, and the receiving of the order was no waiver of any rights against the vessel." A release under seal by a mariner on payment of his wages is only *prima facie* evidence of settlement, and may be rebutted by other evidence. *The David Pratt*, 1 Ware, 495 (1839). By the common law a simple contract debt is not extinguished by the creditor taking a new security unless it be of a higher nature as an instrument under seal, or unless it be agreed to be received in satisfaction of the debt. *The Betsy and Rhoda*, 2 Ware, 117 (1840). But by the local law of the State of Maine this is changed, and yet the presumption of the local law will not be enforced by the Admiralty against a seaman who receives of the owners their negotiable note for his wages, *ibid.* A seaman taking the promissory note of the master, not negotiable, and giving a receipt for his wages and putting the note in suit, is not thereby precluded from proceeding against the vessel for his wages. *The Harriett*,

1 Sprague, 33 (1842). The defence was that the mariner by taking the note and putting it in suit loses his lien on the vessel. Sprague, J., held that the note was not payment. It was not a promissory note in the sense of the law, and was not *prima facie* evidence of payment. The master received no value for his release. The master, before the transaction, was liable for the wages, and until satisfaction and payment, the mariner might pursue any or all of his remedies at the same time. The acceptance of a promissory note for supplies furnished will not be presumed to be a waiver of the lien upon the vessel therefor, unless so agreed at the time. *The Eclipse*, 3 Bissill, 99 (1871). In *Carter v. Townsend*, 1 Clifford, 1, it was held that a lien for repairs and supplies furnished at Norfolk, Virginia, on a ship owned in Maine, is not lost by the creditor taking bills of exchange on one of the owners, which bills were produced to be surrendered or cancelled. It seems to be well settled that the party claiming a maritime lien must either return or offer to return the note or other security accepted by him, or bring it into Court and surrender it to be cancelled. Taking a note and giving time will not necessarily release the maritime lien resulting from supplies furnished a vessel. One who is manager or part owner of a vessel should not

be allowed a lien upon her to the prejudice of outside lien holders. It is well settled that advances and supplies made to a vessel in a home port are presumed to be made on the credit of the owners, and no maritime lien results. *The Queen of St. Johns*, 31 Fed. Rep., 24. The mere giving of a promissory note by the debtor for supplies furnished a ship is no satisfaction of the debt, nor is accepting it a waiver of the lien the creditors may have had therefor. *The Active*, Olcott, 286. To the same effect see *The Kimball*, 3 Wall. 37. The Supreme Court of the United States, by Field, J., in *The Emily Souder*, 17 Wall. at p. 670 (1873), laid down the rule that "by the general commercial law of the world, a promise to pay, whether in the form of notes or bills, is not of itself the equivalent of payment: it is treated everywhere, in the absence of express agreement or local usage to the contrary, as conditional payment only. On principle, nothing can be payment in fact except what is in truth such, unless specially agreed to be taken as its equivalent." Parties, however, must not sleep upon their rights, and therefore it has been held that a lien for supplies to a foreign ship, must, as against a *bona fide* purchaser, be enforced with due diligence. Generally it must be soon after the termination of the first voyage. An assignment of his

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claim by the creditor is not a waiver of the lien. *The General Jackson*, 1 Sprague, 554 (1854). While Courts of Admiralty are not governed by any statute of limitations, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defence. No arbitrary or fixed period of time has been or will be established as an inflexible rule; but the delay which will defeat such a suit must, in every case, depend on the peculiar equitable circumstances of that case. When an admiralty lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defence will be held valid under shorter, and a more rigid scrutiny of the delay than when the claimant is the party who owned the property when the lien accrued. *The Key City*, 14 Wall. 653 (1871). In *The Bolivar*, Olcott, at p. 477, Betts, J., says: "By the marine law there is no fixed period of time within which mariners must proceed to enforce their lien for wages, yet such lien will become extinct or barred by unreasonable delay, if the vessel passes into the hands of a *bona fide* purchaser, ignorant of such claim. A lien, which has accrued upon a vessel for supplies furnished it, is not waived or lost by the acceptance of commercial paper belonging to the lessees of the

vessel. *The General Meade*, 20 Fed. Rep., 923 (1884).

The extent of a maritime lien and the rules governing its discharge or extinguishment are to be determined by the general maritime law, and not by the local law of any State. In *The Chusan*, 2 Story, 455 (1843), s. c. Myer's Fed. Decisions, vol. 23, at p. 250 of latter report, it is laid down by Story, J., that "by the law of New York, or by the law of England, and, indeed, as far as I know, by the law of all the States of the Union except Massachusetts and Maine, which are governed by a somewhat modified doctrine, a note taken in payment of a debt is ordinarily but a conditional payment thereof; that is, it is an absolute payment only when duly paid. The presumption, *prima facie*, in New York, is that a note taken for a debt is a conditional payment only; but this presumption may be rebutted by proof that it was taken as an absolute payment." In the case of *The Napoleon*, 7 Bissill, 393 (1877), s. c. Myer's Fed. Decisions, vol. 23, p. 256, it is held that in the absence of an express contract of waiver, a maritime lien is not extinguished by the acceptance of a note, and that a transfer of such note does not extinguish the lien. In the same case it is also held "that whatever doubt once existed as to the assignability of a general maritime lien,

the question has been put at rest by repeated adjudications. The lien of a salvor on account of salvage service, of a mariner for wages, of a material man for repairs or supplies, is strictly personal, and does not pass to his assignee. The same must be said of a lien for towage. It is equally well settled that an assignment or transfer of the claim which constitutes the basis of the lien, extinguishes the lien." In *The Sarah J. Weed*, 2 Lowell, 555 (1877), it was on the contrary held that by the maritime law a maritime lien is assignable.

CANADIAN CASES.

A maritime lien is not indelible, but may be lost by delay to enforce it, where the rights of other parties have intervened. *The Haidee*, 2 Stuart, 25. In the case of *The Aura*, Young's Ad.

Decisions, 54, the plaintiff was master and co-owner. He accepted a promissory note from three of his co-owners for the balance of wages due him. The note was not paid, and he instituted a suit *in rem* against the vessel for the amount of his wages, and for which the note had been given. Prior to the beginning of the suit, the ship had been sold to a third party, and paid for by him, in ignorance of the master's claim. Held that the master had not lost his lien against the vessel, and his claim was pronounced for with costs. Except in the case of bottomry, a maritime lien is inalienable, and cannot be assigned or transferred to any other person so as to give the transferee a right of action *in rem* as such assignee. *The City of Manitowoc*, Cook, 185.

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THE ST. CLOUD, HER CARGO AND FREIGHT.

Salvage Services—Requisites of—Towage.

The St. C. having sailed from St. John, N. B., with a cargo of deals, bound for Liverpool, went ashore at Dipper Harbor, about twenty-five or thirty miles below St. John. The ship's agents, at the latter place, engaged two tugs, the S. K. and the L., to go down and pull her off. For this service they were to receive an agreed sum, and the S. K. was to receive a further sum, in case the vessel was got off, for towing her back to St. John. When the tugs reached the vessel it was found that more men and appliances were needed, and the S. K. returned to St. John for a steam pump and other appliances. The L., by the request of the master of the vessel, remained to tend on the ship. During the absence of the S. K. the vessel was floated, and through the exertions of the L. the ship was prevented from going on the rocks.

Held:—That the services rendered were more than towage services, and that the L. was entitled to salvage reward.

In this case a summons *in rem* was served upon the ship St. Cloud, of 1500 tons burthen, and of British register. The claim was for \$1,500 for salvage services rendered the St. Cloud the 2nd and 3rd days of January, 1888. The vessel, deal laden, sailed from the port of St. John, N. B., Dec. 30, 1887, bound for Liverpool, Great Britain. On January 1, 1888, the vessel got ashore at Dipper Harbor, about twenty-five or thirty miles from the port of St. John. The master of the vessel went ashore at Dipper Harbor and telegraphed the fact of the disaster to Wm. Thomson & Co., the ship's agents at St. John. The agents at once arranged for two tugs, the Storm King and the Lillie, to proceed to Dipper Harbor for the purpose of pulling the vessel off the beach. The arrangement between Capt. Ferris, of the Storm King, and Mr. R. Thomson, a member of the firm of Wm. Thomson & Co., was that the Storm King was to be paid \$60 for a satisfactory trial to get the vessel off where she then lay at Dipper Harbor, and if she came off, a further sum of \$150 for towing her to St. John. At the suggestion of a representative of one of the insurance companies, the tug Lillie was also engaged to accompany the Storm King, and was to

receive \$50 for a satisfactory trial in trying to get the vessel off. The only arrangement made about the Lillie was that she was to go down and make a satisfactory trial in aiding to get the vessel off. Nothing was said about any towage service on the part of the Lillie. The two tugs went to Dipper Harbor and got alongside the ship at the night tide of January 2, between 11 and 12 o'clock. They remained by her all that tide, but were not successful in moving the vessel. It was then thought best, after consultation between the master of the vessel and Capt. Thomas and Mr. Cowie, the representatives of the insurance companies, for the Storm King to return to St. John for a steam pump and other appliances and more men. At the request of the master of the vessel, the Lillie agreed to remain and tend upon the ship during the absence of the Storm King, for \$50 a day. The Storm King accordingly left for St. John, and while absent, by putting out a warp and kedge anchor, and other means at hand, the vessel was floated and towed out to the middle of the harbor. A fresh breeze sprang up, which carried her over to the eastern side of the harbor. The tug got alongside of the vessel, put a line through the bow pipe and kept her off the rocks on the eastern shore. In going ahead the tug broke her hawser, but the ship now took a start toward the western shore, and when about two-thirds of the way across, the wind took her out of the harbor. The tug then fastened a line to her and started with the vessel for St. John. The Lillie, with the vessel in tow, met the Storm King returning near Musquash, when she was handed over to the latter tug, and finally towed to the port of St. John. The ship in her damaged condition was valued at \$15,200, the cargo at \$12,800, and the freight at \$7,000, or a total of \$35,000. It was also in evidence that the Lillie was 49 tons register, five years old, and originally cost \$7,000. It was also admitted that both tugs were owned by the New Brunswick Trading Company, the plaintiffs in the action, a duly incorporated joint stock company. The defence was that the Lillie should only be paid for towage services, but it was held by the Court that the services rendered were real salvage services, and the promovents were awarded \$700 and costs.

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 ST. CLOUD. C. W. Weldon, Q. C., for the plaintiff, the tug Lillie, cited *The Minnehaha* (1), *The White Star* (2), *The I. C. Potter* (3), *The Jubilee* (4), *The Alfred* (5), Pritch. Dig., secs. 751, 781, 783.

F. E. Barker, Q. C., for defendants, argued that these cases established that when there is an agreement for either towage or salvage it will be enforced, provided in carrying it out no unexpected circumstances arise outside the contemplation of the parties at the time they made the agreement, in which case the Court can give additional remuneration, otherwise the agreement will be carried out. Salvage services may arise during towage service which would justify tug abandoning the towage and claim remuneration for salvage. *The Minnehaha* is a case in point. The service rendered by the Lillie was within the agreement made with the ship's agents. The tug was in the employ of the ship at \$50 per day, and the ship was entitled to have her services for the full time, as agreed. There were no peculiar circumstances in this case to warrant salvage reward.

Weldon, Q. C., in reply. Dr. Barker has not given a proper view of the evidence. The tug is not required to tow at all hazards. The engagement was at an end by sending the Storm King to St. John. Then another arrangement was entered into. The plaintiffs are entitled to recover for towage, and subsequently for salvage. The Lillie is entitled to pay for risk run. The master of the ship wanted the Lillie to tow the ship. The exertions of the Lillie kept the vessel from the rocks on the east shore of the harbor. In doing that the tug undertook a greater risk than mere towage service. Without the aid of the tug, the vessel in her disabled condition could not have got out of Dipper Harbor, and looking at all the circumstances it is evident the services performed were different from those contracted for, and were such as to entitle the plaintiffs to salvage reward.

And now (June 15, 1888), the judge having taken time to consider, delivered the following judgment:

(1) 4 L. T. N. S. 411.

(3) L. R. 3 A. & E. 292.

(2) L. R. 1 A. & E. 68.

(4) 42 L. T. 594.

(5) 50 L. T. 511.

WATERS, J. Under the evidence before the Court, I am of opinion that the tug Lillie had not entered into any contract for towage service. She was sent down to Dipper Harbor simply to aid and assist the tug Storm King in pulling the ship from off the beach, for which service she was to receive \$50. The towing of the ship to St. John, in case she should be got off, was, I think, to be the work of the Storm King alone, which was a large tug and fit for sea service. The term for which both the Storm King and Lillie were jointly engaged was, therefore, on their failure to accomplish the removal of the ship from the beach on the night of their arrival, treated by all parties as ended. The captain of the Storm King says they then gave up the idea of getting the ship off until they could lighten her by having the water pumped out and some of her deckload taken off. The captain of the ship also says, as the ship had not floated with the assistance of the two tugs, I came to the conclusion that the ship could not be got off without the steam pump. For these purposes the Storm King was sent back to St. John for a steam pump and for more men. The Lillie remained with the ship at the request of the master, who said he wanted the Lillie to stay and tend upon the ship, and upon a distinct demand from the captain by the Lillie for \$50 a tide. The Storm King then left for St. John and the Lillie remained by the ship. What service did the tug Lillie perform after that for the ship? On the morning of 3rd January she ran out a warp and kedge anchor, and when the tide began to rise she got a line from the ship's quarter. At high water the ship floated and the tug towed her out to where the kedge was anchored. The wind was then blowing fresh from the westward and the kedge would not hold the ship, and the tug had all she could do to hold her. Here the serious trouble with the ship began, as she had no anchors and was filling with water. The master asked the tug to tow the ship on to the mud on the western side, but this the tug was unable to do against the strong wind. The master of the ship says he then called out and asked the tug if he could tow them to St. John; being answered in the affirmative, he ordered the

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St. CLOUD. tug to go ahead. The tug at this time had the ship by the stern; in going ahead the hawser parted, and the ship was being driven by the force of the wind towards a pile of rocks on the east side of the harbor. The tug then steamed hard and came up on the ship's starboard side, between the ship and the reef, and threw a line to the ship, worked back, and got the ship stopped just as she touched the rocks. Then the line broke; another line was then got out from the ship's bow to the tug, and she then towed the ship clear of the rocks into the middle of the harbor, then the ship took a start towards the other shore when the line parted, and she had got about two-thirds over to the western shore when the wind took her again and started her out of the harbor, the tug again got alongside and got a line from the ship's bows, which was joined to another piece from the tug, making a short hawser not over fifteen fathoms long, and with this the tug towed the ship out of the harbor and up the Bay until she met the tug Storm King coming back, which took hold of the ship and brought her into St. John harbor.

I cannot view this service of the tug Lillie as other than salvage service; at Dipper Harbor the ship, after she was floated off the beach, was powerless without anchors to protect herself, she was filling with water, and was in a harbor where she would ground in any part of it at low water; when she was blown towards the rocks on the eastern side she was only rescued by the extraordinary efforts of the tug, which exposed itself to peril in its efforts to save the ship; the captain of the tug says he had to run sharp to clear the ship from the rocks, and if anything had then happened to his machinery, the tug would have gone on the rocks. It is very clear that this Dipper Harbor was a dangerous place for the ship, and that it was necessary for her preservation that she should be got out of it, but without the aid of the tug this was impossible; the work of getting her out was undertaken by the tug with the only remaining hawser, which was quite too short to tow such a ship with safety, nevertheless she succeeded in towing the ship along the coast of the Bay of Fundy until she delivered her to the tug Storm

King. Had the Lillie not undertaken this service, the ship would evidently have either been driven ashore again in Dipper Harbor, or been blown out to sea by the strong westerly wind, which all say was then blowing fresh. All the work done by the Lillie, from the time the ship floated until she was taken in tow by the tug Storm King, I take to be the performance of a service quite beyond the scope of her arrangement made with the captain of the ship, which was to tend upon the ship whilst she would be lying in her first position in Dipper Harbor, or until the additional help sent for by the Storm King would have relieved her from the place on which she had grounded. If her services led to the rescue of the ship, which I believe they did, she should be remunerated as for salvage services.

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In salvage cases the estimate of remuneration is governed by the peculiar circumstances of each case: it is not merely payment for work and labor; many things may be taken into consideration — the season of the year, the state of the weather, the degree of damage and danger as to the ship and cargo, the risks and perils of the salvors, and the value of the property. Considering the value of the property, the danger to which it was exposed, and the services rendered by the salvors, I award to the plaintiffs the sum of seven hundred dollars, and costs.

Decree accordingly.

Salvage is defined as the service rendered by persons who rescue a ship or other property from loss or damage by sea perils, and who restore it to the rightful owners. *The Thetis*, 3 Hag. 14, 48. The term "Salvage" is also used to signify a compensation to be made by the owners of the ship, cargo, or other things, to the persons by whose exertions their property is saved from impending peril,

or recovered after actual loss. The ingredients of salvage services are, first, enterprise in the salvors in going out in tempestuous weather to assist a ship in distress, risking their lives to save life and property; secondly, the degree of damage and distress from which the property is rescued, whether it were in imminent peril and almost certain to be lost if it were not at the time rescued; thirdly, the degree

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of labor and skill undergone and displayed by the salvors; fourthly, the time occupied; fifthly, the respective values of the property saved and risked. When all these concur, a large award will be given; when none, or scarcely any, the compensation can hardly be termed a salvage compensation, but it is little more than remuneration *pro opere et labore*. Newson's *Salvage*, etc., p. 1. Salvage is the reward payable for services rendered in saving property lost at sea, or in saving any wreck, or in rescuing a ship or boat, or her cargo, or apparel, or the lives of the persons belonging to her from loss or danger. W. & Bruce (ed. 1886) 114. Salvage, in its simple character, is the service which volunteer adventurers spontaneously render to the owners in the recovery of property from loss or damage at sea, under the responsibility of making restitution, and with a lien for their reward. Mac-lachlan on *Ship*. (4th ed.) 642. It is also said in English maritime law to be the reward which is earned by those who have voluntarily saved or assisted in saving a ship or boat, or their apparel, or any part thereof; or the lives of persons at sea; or a ship's cargo, or any part thereof from peril; or a wreck from total loss. If persons are summoned to the aid of a vessel in distress by those on board, a want of suc-

cess on their part does not prevent them from being entitled to salvage reward if the vessel is ultimately saved. Roscoe, Ad. Prac. 9. In the United States it has been held that salvage is compensation for actual service rendered to the property charged with it. *Talbot v. Seenan*, 1 Cranch. 1; to constitute a valid claim for salvage there must be a marine peril, voluntary service not owed, and a saving of the property or some portion of it. *New York Harbor Protection Co. v. The Clara*, 23 Wall. 1. See *The Neptune*, 1 Hag. 236. The efforts of the master and seamen to save their vessel from disaster would not constitute a salvage service, as their duty requires such effort.

All services rendered to ships at sea in danger or distress are salvage services. It is not necessary that the distress should be actual or immediate, or that the danger should be imminent and absolute. It will be a salvage service if, at the time it was rendered, the ship had encountered any danger or misfortune which might possibly expose her to destruction if the services were not rendered. *Kay on Ship*., vol. 2, 999. Salvage is the compensation allowed to persons by whose assistance a ship or her cargo has been saved, in whole or in part, from impending peril on the sea, or in recovering such property from actual loss, as in

cases of shipwreck, derelicts or recapture. Success is essential to the claim; as, if the property is not saved, or if it perish, or in case of capture if it is not retaken, no compensation can be allowed. More than one set of salvors, however, may contribute to the result, and in such cases all who engaged in the enterprise and materially contributed to the saving of the property are entitled to share in the reward which the law allows for such meritorious service, and in proportion to the nature, duration, risk, and value of the service rendered. Myer's Fed. Dec., vol. 23, p. 828. Salvage is also defined to be a compensation to be made by the shipowner or merchant to other persons, by whose assistance the ship or its lading may be saved from impending peril, or recovered after actual loss. The policy as well as justice of awarding such a compensation is so obvious that it has been in all ages allowed by the codes of all civilized nations. Salvage may become due upon rescue. *The Edward Hawkins*, Lush. 515; s. c. 31, L. J. Ad. 46, either from the perils of the sea or from the hands of enemies. 13 & 14 Vict., c. 26; 27 & 28 Vict., c. 25, ss. 40, 41. The property in respect of which salvage is claimed must be salvaged or saved. Smith's Merc. Law (10th ed.) 389. Salvage is an allowance

made for saving a ship or goods, or both, from the dangers of the seas, fire, pirates or enemies; and it is also sometimes used to signify the thing itself which is saved. Park on Mar. Ins. (5th ed., 1802) 131. It is in the former sense in which it is considered in this note. The justice and propriety of making an allowance for salvage services must be evident to all. Those who rescue life or property from imminent peril, at the risk of their own lives, should be encouraged by liberal rewards. And hence it is that from the time of the Rhodians to the present all maritime states have made regulations respecting rewards for salvage services. By the law of *Rhodes*, the rate for salvage services in several instances was fixed, sometimes at a fifth, sometimes at a tenth, and at other times at one-half of what was saved. The laws of *Oleron*, on the other hand, left it to the Courts to award such amount in each case as they should deem fair and reasonable under the circumstances, having a due regard to the risk run, the service performed, and the expense incurred. The law of England has followed the laws of *Oleron* in declaring that reasonable salvage only shall be allowed. The statute 27 Edward III., c. 13, was passed to suppress the plunder of wrecked vessels, and to limit the exorbitant demands of

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those saving property. But the chief enactment respecting salvage is found in the statute 12 Anne, c. 18. s. 2, and this was made perpetual by 4 George I., c. 12. Then followed 26 George II., c. 19, which was intended to suppress the excesses complained of in the statute of Anne.

WHEN SALVAGE AWARDED.

The following, taken from Newson, p. 3, *et seq.*, are instances of salvage services: Supplying in boisterous weather and in a dangerous place an anchor, cable and chain to a vessel which has shipped her anchor, although not otherwise disabled. *The Prince of Wales*, 6 Notes of Cas. 39; although they are not needed. *The Æolus*, L. R. 4 A. & E. 29; towing a ship near the shore in unsettled weather after her ground tackle is disabled. *The Albion*, Lush. 282; towing away one of two ships in collision from the other. *The Vandyck*, 7 P. D. 42; towing away a vessel in dock from surrounding warehouses on fire. *The Tees*, Lush. 505; a ship sending on board another ship, short of hands through death or illness, or derelict, some of her own crew to assist in navigating her. *The Roe*, Swa. 84; in such case not only will the men sent on board be entitled to salvage reward, but also the owners, master, and remainder of the crew of the salving ship. *The Charles*, L. R.

3 A. & E. 536; in sending a mate on board a ship on the high seas to take the place of a master who is dead. *The Janet Mitchell*, Swa. 111; in seeking a ship in distress for the purpose of rendering assistance. *The Albion*, Lush. 282; communicating the fact of salvage services being required. *The Ocean*, 2 W. Rob. 91; saving lives and property from a ship on fire. *The Eastern Monarch*, Lush. 81; services of a third vessel in carrying orders from a salving ship. *The Undaunted*, Lush. 90; raising a sunken ship. *The Catherine*, 12 Jur. 682; lying alongside a vessel in a gale at her request to assist if needed. *The Undaunted*, Lush. 90; see also *The Philotaxe*, 29 L. T. 515; rescuing a ship from being plundered by natives. *The Lady Worsley*, 2 Spinks 253; saving and preserving wreck, services performed on land to a ship or goods rescued from sea perils. *The Mary Ann*, 1 Hag. 158; recapturing ship or goods from pirates or mutineers. *The Trelawney*, 3 C. Rob. 216; or from an enemy. Giving information of the position and danger of a vessel in want of assistance will entitle to salvage reward. *The Sarah*, 3 P. D. 39; see also *The Nile*, L. R. 4 A. & E. 449; also instructing a ship as to what measures to adopt for her safety. *The Eliza*, Lush. 536; but merely giving information as to

locality is not sufficient. *The Little Joe*, Lush. 88. Success is the main ground on which a salvage reward is given. *The Lockwoods*, 9 Jur. 1017; to the same effect. *The Edward Hawkins*, Lush. 516. As a general rule, a mere attempt to save lives or property, however meritorious, or whatever degree of risk or damage may have been incurred, if unsuccessful, furnishes no title to salvage reward. *The Zephyrus*, 1 W. Rob. 329. In *The Undaunted*, Lush. 90, it was held that efforts to give assistance under an engagement to a ship in distress will, although the ship receives no benefit from them, be rewarded as being in the nature of salvage services, if the ship is otherwise saved. But where a tug, under a contract to tow another vessel from sea into dock, was able to save the ship from a danger resulting from a mishap to another tug, it was held that as there was no immediate danger to the ship or risk to the tug, there could be no claim for salvage, *The Liverpool* (1893), P. 154. The conditions required to engraft salvage on to towage are considered in this case.

Where salvors enter into an agreement to take a disabled vessel into harbor for a specified sum, and do all in their power to perform their engagement, but in consequence of an adverse change of wind fail to fulfil it,

they are nevertheless entitled to salvage reward, per Sir Robert Phillimore, in *The Aztecs*, 21 L. T. N. S. 797 (1870). The same learned judge still later, in *The Nellie*, 29 L. T. N. S. 516 (1873), held that where a steamship has been engaged to render assistance to another in distress by towing her to her port of destination, and after several hours' towing the ships were parted by no fault of the salvor, and the conduct of the ship in distress leads the salvor to the honest belief that his services are no longer required, and thereupon the latter proceeds to her own destination, he is not thereby deprived of his right to salvage reward, but upon the other vessel arriving safe in port by her own exertions, may proceed against her in respect of the services actually rendered. The agreement of a master of a ship in distress, as to salvage, will generally be upheld, unless fraud is proved. *The Henry*, 15 Jur. 183; s. c. 2 Eng. L. & Eq. 564.

Where salvors on board a vessel voluntarily abandon her, they forfeit any right they might have to salvage reward. *The Killeena*, 6 P. D. 193 (1881). Sir Robert Phillimore in this case cites, with approval, the decision in *The Undaunted*, *supra*, and the language of Lord Stowell in *The Jonge Bastiaan*, 5 C. Rob. 324. A steamship was requested by another steamship in distress to

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stand by her. An agreement was accordingly made between the two masters, for a fixed sum, that the sound vessel would stand by the injured one till she was in a safe position to get to port. The sound vessel remained by the damaged vessel till the latter was about to sink, when she took her crew on board, and the damaged steamer immediately afterwards sank. The owners, master, and crew of the salving ship brought an action for life salvage, but it was held that as no *res* was saved the action would not lie either as a salvage action simply, or on the agreement. *The Renpor*, 8 P. D. 115 (1883). At p. 117, Brett, M. R., delivering the judgment of the Court of Appeal, says: "It is said that under some circumstances if life is saved after the services of the salvors have been requested by the master of the ship which is in danger, the ship-owner is bound to pay salvage, although there is no *res* saved, and *The Undaunted*, Lush. 90, has been cited in support of this proposition. *The E. U.*, 1 Spinks 63, has also been relied on as an authority in favor of it, more especially a dictum of Dr. Lushington, which is to be found in that case. But *The Undaunted* is really no authority in favor of the plaintiffs' contention, because in that case the ship was saved, and therefore there was a fund from which payment could be made. The question was then

raised whether the plaintiffs could be paid out of that fund, and it was decided they could, because they had exerted themselves to save the ship at the request of the master. It is unnecessary for us to say if we agree in that decision, but it in no way broke the fundamental law of the Admiralty Court that something must be saved in order to give valid grounds for a salvage action. *The E. U.* is a similar case, but there a supposed case is mentioned by Dr. Lushington which is said to support the plaintiffs' contention in the present case. If Dr. Lushington did state this supposed case as containing his view of the law, it is contrary to what he had laid down before, and if it does, with all due respect for his great authority, I am unable to agree with it. But I doubt if it is an exact statement of that learned judge's opinion, and the cases of *The Fusilier*, Br. & Lush. 350; *The Zephyr*, 2 Hag. 43, and the *Cargo ex Schiller*, 2 P. D. 145, are contrary to it, and support the rule that some property must be saved to give rise to a claim for salvage." The learned editors of Williams & Bruce, Ad. Prac. (ed. 1886) p. 119, say of *The Renpor* that "notwithstanding the very high authority of the learned judge who pronounced this opinion, it is submitted that where a claim in the nature of salvage depends upon a contract arising from an

express request, the terms of the contract alone regulate the right to the promised reward, and that in an action *in personam* it is immaterial whether the property is saved or not, and that there is no good reason why the circumstance that the property has been saved by means unconnected with the efforts of the claimant should have the effect of altering the character of the contract, or of the services rendered under it. Yet so long as the exposition of the law given by the Court of Appeal in the case referred to remains unquestioned by higher authority, the saving of a portion of property by some means must be regarded as a condition precedent to an action for services in the nature of salvage, even though rendered under an express agreement." The same rule obtains in the United States. In *The John Wurts*, Olcott 462, it was held that an indispensable ingredient of a salvage claim is that the service has contributed immediately to the rescue or preservation of property in peril at sea. See also Cohen's Ad. Law (1883), 39. A moiety of the property saved, with costs, is the maximum of remuneration that can be allowed to salvors; and this rule applies to Vice-Admiralty Courts abroad. It appears, however, that this rule does not obtain in derelict. *The Inca*, Swa. 370; s. c. 12 Moo. P. C. 189. See also *The L'Es-*

perance, 1 Dod. 49; *The Frances Mary*, 2 Hag. 90; *The Scindia*, L. R. 1 P. C. 241; *The Rasche*, L. R. 4 A. & E. 127. A higher rate is generally awarded to steamers than to other vessels. *The Kenmure Castle*, 7 P. D. 47.

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SALVAGE OF LIFE.

The Admiralty Court prior to 1846 had no jurisdiction to award salvage for the preservation of life alone, but where both property and life were saved, it became the established usage of the Court to give a higher rate of salvage against the property, and in that way indirectly salvors of life were remunerated. *The Zephyrus*, 1 W. Rob. 331; *The Aid*, 1 Hag. 84; *The Johannes*, Lush. 182; *The Fusilier*, Br. & Lush. 341. Statutory authority however was given to the Court to decree reward for life salvage, under secs. 19 and 21 of 9 & 10 Vict., c. 99, "An Act for consolidating and amending the laws relating to wreck and salvage." This statute has been repealed, but the provisions of the sections are substantially re-enacted by the Merchant Shipping Act, 1854, secs. 458 and 459, and under the latter section it is provided that salvage for preservation of life shall have priority over all other salvage claims, and in the event of the property salvaged proving insufficient to meet the claims, the Board of Trade, in its discretion, may meet the claim out

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of the Mercantile Marine Fund, in whole or in part. See *The Coromandel*, Swa. 207. The Merchant Shipping Act, 1854, limited the salvage services in such cases to the "shore of any sea or tidal water situate within the limits of the United Kingdom," but by 24 Vict., c. 10, s. 9, the Admiralty Court Act, 1861, the provisions of the Act of 1854 were extended to the salvage of life from any British ship or boat, wheresoever the services may have been rendered, and from any foreign ship or boat, when the services have been rendered either wholly or in part in British waters; and by 25 & 26 Vict., c. 63, sec. 59, it is provided that "Whenever it is made to appear to Her Majesty that the Government of any foreign country is willing that salvage shall be awarded by British Courts for services rendered in saving life from any ship belonging to such country, when such ship is beyond the limits of British jurisdiction, Her Majesty may, by Order in Council, direct that the provisions of the principal Act, and of this Act, with respect to salvage for services rendered in saving life from British ships shall in all British Courts be held to apply to services rendered in saving life from the ships of such foreign country, whether such services are rendered within British jurisdiction or not." See MacLachlan

on Ship. (4th ed.) 654; Newson on Salvage, 46. *The Willem III.* L. R. 3 A. & E. 487. The owners of a ship or boat will not be liable for life salvage where none of their property is saved. *The Cargo ex Sarpedon*, 3 P. D. 28. See also *The Cargo ex Schiller*, 2 P. D. 145; *The Renpor*, 8 P. D. 115; *The Annie*, 12 P. D. 50. In the latter case the defendants' vessel, through collision, was sunk in the Thames by the fault of another vessel. The Conservators of the Thames, under the statutory authority given them by 20 & 21 Vict., c. 147, s. 86, raised the wreck and sold it; the proceeds were insufficient to defray the expenses, and under sec. 86 the Conservators recovered the deficiency from the defendants. An action for life salvage was instituted against the defendants' vessel, but it was held that the salvors could not recover, as no property was saved. Sir James Hannen, in delivering judgment, said: "I feel no doubt as to this case. There can be no claim for salvage services against a person; something must be saved to which the claim can attach. In the present case *The Annie* was not saved; yet those who claim salvage do so in respect of a life salvage service." In the American Admiralty it has been held that there is no salvage for saving life alone, but saving life

enhances the amount of salvage for saving property. *Cohen*, Ad. Law, 49 (1883). *The Emblem*, 2 Ware, 68; *The George Nicholson*, Newberry, 449; *The Boston*, 1 Sumner, 328. In *The Plymouth Rock*, 9 Fed. Rep. at p. 418 (1881), Brown, J., said: "On the other hand, the large number of passengers whose lives were involved in the safety of the vessel is in this case an important consideration, although by the general maritime law, aside from statute, the saving of human life, dissociated from the saving of property, is not a subject of salvage compensation, but left to the bounty of individuals; yet, when connected with the rescue of property, it is uniformly held to enhance the meritorious character of the services and the consequent remuneration. *The Aid*, 1 Hag. 84; *The Queen Mab*, 3 Hag. 242; *The Emblem*, Daveis' Rep. 61; *The Fusilier*, 3 Moo. P. C. 51; Marvin on Salvage, sec. 121. Life salvage is now expressly provided for by the British Merchant Shipping Act of 1854, ss. 458, 459; but we have no similar statute in this country." It will be noticed that this statement of the law corresponds with that in force in England prior to 1846.

FORFEITURE OF SALVAGE.

Misconduct or negligence on the part of the salvors may in-

duce the Court to reduce the amount of salvage, or to refuse it altogether. Violent and overbearing conduct on the part of the salvors will operate to diminish the amount of salvage. *The Marie*, 7 P. D. 203. In *The Yan-Yean*, 8 P. D. 147, refusing to allow the master on board his ship worked a forfeiture of salvage. Want of skill in manœuvring the salving vessel was held a sufficient ground to diminish the amount by one-half. *The Dwina* (1892) P. 58. Salvors forcibly preventing the mate and two of the crew from going in the boat with them were deprived of all salvage, and the suit was dismissed with costs. *The Capella* (1892) P. 70.

Both salvors and finders are under an implied obligation to use good faith, honesty, skill and energy. *The Ida L. Howard*, 1 Low. at p. 6; mismanagement, or unskilfulness, or gross negligence on the part of the salvors, seriously and injuriously delaying the rescue, may reduce, or even forfeit, the compensation, although the property may ultimately be brought safe ashore. *The Katie Collins*, 21 Fed. Rep. 409; there must be good faith, meritorious service, complete restoration, and incorruptible vigilance on the part of the salvors. *Cromwell v. The Island City*, 1 Black, 121; so also spoliation or gross negligence will work a forfeit. *The Bello Corrunes*, 6 Wheat.

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152. The same result may follow upon evidence of an intent to embezzle. *The Sumner*, 1 Brown, 52; but to cause a forfeiture of salvage there must be evidence of misconduct on the part of the salvors. The thoughts or desires of salvors are immaterial, unless their conduct be influenced thereby. *The Cherokee*, 31 Fed. Rep. 167. An intention, however, on the part of salvors not to perform all the service required by the ship in distress, or to protract from improper motives the duration of the service, will entail a forfeiture of all right to salvage. *The Magdalene*, 31 L. J. Ad. 22; s. c. 5 L. T. N. S. 807. But in all cases the evidence of misconduct must be conclusive to induce the Court to deny or diminish the amount of salvage remuneration. *The Charles Adolphe*, Swa. p. 156; and the burden of proof is on those alleging misconduct. *The Atlas*, 15 Moo. P. C. 329; s. c. Lush. 518. See *The Glory*, 14 Jur. 676; s. c. 2 Eng. L. & Eq. 551.

PLEADINGS, ETC.

In salvage suits it is desirable, if not necessary, to state the leading details of the service more at length than indicated by the Rules. *The Isis*, 8 P. D. 227; and to introduce into the statement of claim as many ingredients of a salvage service as possible. See *The Clifton*, 3

Hag. 120. The ship salvaged should not be arrested for an exorbitant amount, as the salvors thereby run the risk of being condemned in costs for procuring bail for such an amount. *The George Gordon*, 9 P. D. 46. Parties will not usually be allowed at the hearing to contradict their affidavits of value. See *The Hanna*, 3 Asp. 503; s. c. 37 L. T. N. S. 364. If the plaintiffs think the defendants' affidavits of value unsatisfactory, they should take out a commission of appraisement. *The Varuna*, W. & Br. 429 n. Fair and reasonable agreements fixing the amount of salvage will generally be upheld. *The True Blue*, 2 W. Rob. 176; but such agreements may be set aside as inequitable. *The Medina*, 2 P. D. 5. See also *The Silesia*, 5 P. D. 177; *The Monarch*, 12 P. D. 5. Where the defendants admit the allegations of the statement of claim, the action is tried upon the pleadings, and the parties are precluded from calling any evidence at the hearing. *The Hardwick*, 9 P. D. 32; an admission of the facts alleged, but a denial of the inferences of fact set forth in the statement of claim, will enable the plaintiffs to call evidence to establish the inferences. Admission by pleading extends to matters of fact, but not of law. *The Peerless*, Lush. 103. Salvors cannot proceed against the ship and

cargo *in rem*, and *in personam* against the consignees of cargo in the same libel. *The Sabine*, 101 U. S. 384. Clifford, J., in delivering the judgment of the Court, at p. 388, says: "Actions *in rem* are prosecuted to enforce a right to things arrested to perfect a maritime privilege or lien attaching to a vessel or cargo, or both, and in which the thing to be made responsible is proceeded against as the real party; but actions *in personam* are those in which an individual is charged personally in respect to some matter of admiralty and maritime jurisdiction. Both the process and proceedings are different, and the appropriate decree in the one might be absolutely absurd in the other." It was held in *The Hope*, 1 W. Rob. 154, that an action *in personam* cannot be engrafted on one *in rem*. But where there is a remedy both *in personam* and *in rem*, a person who has resorted to one of the remedies may, if he does not get thereby fully satisfied, resort to the other. *The Orient*, L. R. 3 P. C. 696. Salvage suits may be consolidated on the motion of the plaintiffs, and without the consent of the defendants. *The Melpomene*, L. R. 4 A. & E. 129. In *Houseman v. The North Carolina*, 15 Pet. 40, the Supreme Court of the United States held that the Admiralty Court alone has jurisdiction to try a question of salvage.

But it has been held by the Supreme Court of New Brunswick that while questions relating to salvage can usually be better adjudicated upon in the Admiralty than in any other Court, and, where apportionment of the amount among several claimants is asked for, it is probably a matter exclusively within the jurisdiction of the Admiralty Court, yet where the claim is simply for salvage services, and no question of apportionment arises, an action at law can be maintained, *per* Allen, C. J., and Wetmore, J., Weldon, J., dissenting. *Copp v. Read*, 3 Pugsley, 527 (1876).

This question has recently been under consideration in the Courts of Ontario. A vessel was stranded on the northern shore of Lake Erie. The master telegraphed to the manager of a wrecking company at Detroit for tugs and wrecking appliances, which the manager, by telegram, agreed to furnish. They were accordingly sent, and the stranded vessel was saved. The plaintiffs claimed to recover an amount exceeding the value of the vessel, made up of *per diem* charges for the tugs and appliances. *Held*, that in actions in the High Court, salvors, in the absence of a specific or express agreement to the contrary, must be taken to render their services under and subject to the rule of the Admiralty Court,

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limiting the maximum amount of salvage to a moiety of the value of the salvaged vessel, and cargo, if any, which rule is equally applicable to wrecking companies as to ordinary vessel owners; that the agreement must define a specific amount as to the salvage to be paid or a rule whereby it may be determined; and that there was no agreement in this case, but merely a request to perform the service. It also appears that the master cannot, by express agreement, bind the owners to pay salvage beyond the value of the vessel. *The International Wrecking and Transportation Co. v. Lobb*, 11 O. R. 408 (1886). The point as to jurisdiction does not appear to have been raised, except as to the amount of damage to be allowed, which was awarded under the Admiralty rule. Under the provisions of "The Wrecks and Salvage Act," c. 55, sec. 24 (Cau.), now R. S. C., c. 81, sec. 43, it is provided that when any ship within the limits

of Canada is wrecked, abandoned, stranded, or in distress, all salvage services rendered shall be payable as are reasonable under the circumstances; but under sec. 56 of c. 81 it is also provided that nothing therein shall be taken to affect the jurisdiction of any Court of Vice-Admiralty in Canada in any matter or case, civil or criminal.

In salvage cases there is no rule binding a Court of Appeal not to interfere with an award unless the amount is so large or so small that no reasonable person could fairly arrive at that sum; but the amount awarded will be diminished or increased if, after a careful consideration of the facts, and after giving every possible weight to the view of the judge, the Court is of the opinion that the amount is so large as to be unjust to the owner of the ship which has been in distress, or so small as to be unjust to the salvors. *The Accomac* (1891), P. 349. See also *The Lancaster*, 9 P. D. 14.

THE ENRIQUE—ABIRASTURI.

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June 15.

Personal Injury—Jurisdiction—26 Vict., c. 24, sec. 10.

A foreign steamship, the E., while in the harbor of St. John, N. B., loading a cargo of deals, bought and received on board a quantity of coals for the use of the ship. The coals were purchased to be delivered in the bunkers of the steamer, and the coal merchant employed a third party to put the coals on board. The steam power to hoist the coals on board was furnished by the E. The plaintiff was employed by the third party to put the coals on board, and while so employed was injured by the breaking of the hoisting rope.

Held:—That an action could not be maintained against the steamer; that the Court had no jurisdiction; and that the Vice-Admiralty Courts Act, 1863, sec. 10, sub-sec. 6, did not confer authority to entertain such an action.

A foreign steamship, the Enrique, hailing from Bilbao, in Spain, was in the harbor of St. John, N. B., in August, 1887, loading a cargo of deals for Europe. While there it became necessary for her to purchase a quantity of coals for the use of the vessel. The coals were purchased from a coal merchant of the place, and it was a part of the contract of purchase that he should deliver the coals on board into the bunkers of the steamer. The coal merchant, Busby, employed a third party—Callaghan—to deliver the coals on board. Callaghan employed and paid the men engaged in the work of delivering the coals to the steamer, and with others, James Everson, the plaintiff, was employed by Callaghan to put the coals on board. The steamer furnished the steam power to hoist the coals in tubs from a scow alongside to the vessel. The steamer, it appeared, supplied a derrick and chain for the hoisting, but Callaghan, who had charge of the delivery of the coals, preferred to use a rope belonging to the steamer instead of the chain, as he said it was handier and more easily worked. The rope was 4½ inch, and had been used by the steamer in hoisting cargo on board. It had been spliced in one part, and before the plaintiff began work, Callaghan called his attention to the rope, and told him to keep his eye on it, as it might break

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and hurt him. After this the plaintiff began work, and while at work the rope broke where it was spliced, and in consequence the plaintiff was thrown violently from the steamer to the scow, a distance of seven or eight feet, and was quite seriously injured. He was laid up and unable to work for a length of time. The steamer was arrested on a claim for personal injury in the sum of \$1,000. The Court, however, held that the plaintiff could not recover; that there was no jurisdiction; that the Vice Admiralty Courts Act, 1863, did not apply; and the action was accordingly dismissed with costs.

Daniel Mullin, for the plaintiff, cited *The Teddington* (1); *The Sylph* (2); *The Beta* (3); *The Virgil* (4); *The Sarah* (5); *The Friends* (6); *The Toronto* (7); *The Chase* (8); 24 Vict. c. 10; 26 Vict. c. 10; Coote. Ad. Prac. 13.

F. E. Barker, Q. C., for the vessel and owners, contended that the action should be dismissed for the following reasons: (1) There was no evidence of negligence, and without negligence on the part of ship or crew no action will lie. (2) The plaintiff was not in ship's employ, but in employ of Callaghan, in no way connected with ship. He was either Callaghan's or Busby's servant, and engaged by them in loading the coal. There was no duty in any way arising from the ship to the plaintiff. (3) The plaintiff was guilty of contributory negligence, or the same thing; he, with full knowledge of the danger, if there was any, undertook the work and placed himself in a position of danger, and cannot recover. *Volenti non fit injuria*. (4) Callaghan, the plaintiff's employer and principal, selected and used the rope with full knowledge of its defects, if it had any, and gave full notice of same to plaintiff, after a chain had been offered and refused by Callaghan, as he preferred a rope. (5) The Court has no jurisdiction for a personal injury of this kind. (6) If the Court has jurisdiction under the Act cited, it is only in cases where the injury would be a damage

(1) Ante, p. 45.

(2) L. R. 2 A. & E. 24.

(3) L. R. 2 P. C. 447.

(4) 7 Jur. 1174.

(5) 1 Stuart, 89.

(6) Ibid, 118.

(7) Ibid, 170.

(8) Young's Ad. Dec. 117.

done by the ship herself. He cited *Welfare v. London & Brighton, &c., Ry. Co.* (1); *Senior v. Ward* (2); *Smith v. Brown* (3); *The Vera Cruz* (4).

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Mullin, in reply, contended that the ship supplied the rope and derrick, and that when the defect in the rope was pointed out to the mate, he insisted it was safe, and the ship was therefore liable for the injury. The contract between the ship and Busby was that, while the latter had to put the coal on board, the ship had to provide the hoisting gear. In this view it was therefore immaterial whether plaintiff was in employ of ship or not. It was the duty of the ship to furnish safe and proper appliances. *The Vera Cruz* was not applicable to this case, but the cases he had already cited were in point. The plaintiff had lost two months' time, and should be allowed at least \$2.50 per day, and further damage for his bodily injury and medical attendance.

The following judgment was now (June 15, 1888) delivered by

WATTERS, J. This was an action *in rem* brought by the plaintiff to recover damages for personal injuries sustained by him on board the steamer *Enrique*, in August, 1887, whilst tending the fall for hoisting coal tubs on board the ship from a scow alongside. The steamer was anchored in the stream in this harbor, and was at the time being supplied with coal, which was unloaded from the scow. The plaintiff was employed on the deck of the ship tending the hoisting rope which lifted the coal tubs from the scow to the ship's deck, where he would dump the coal into wheelbarrows. This hoisting rope broke near the steam hoisting winch on deck whilst hoisting a tub of coal, and the rope caught the plaintiff and pulled him over the rail down into the scow, whereby he sustained bodily injury.

The steam hoisting winch, rope and gear had been furnished by the steamer.

The suit was brought under the Vice-Admiralty Act of 1863, sec. 10, which provides that the Vice-Admiralty Court

(1) L. R. 4 Q. B. 693.
(2) 1 E. & E. 384.

(3) L. R. 6 Q. B. 729.
(4) 9 P. D. 88.

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shall have jurisdiction over claims for "damage done by any ship." Upon the opening, and again at the close of the case, it was urged by Dr. Barker, for defendant, that this Court had no jurisdiction over a claim for a personal injury of this kind; that the jurisdiction only extends to claims for damage done by the ship itself. Other grounds were also urged against the plaintiff's right to recover, viz.: That plaintiff was not in the employ of the ship; that no negligence was imputable to the ship or her officers to render the ship liable; and further, that plaintiff had continued at the work of hoisting with full knowledge of the danger, and that he thereby took the risk upon himself.

Since hearing the arguments in this suit I have seen two cases bearing immediately upon the question of the Court's jurisdiction as raised in this case. First, the case of *The Robert Pow* (1), the cause was entered as a cause of damage on behalf of the owners of the *Ilma* against the steam tug Robert Pow. The petition alleged that the *Ilma* had engaged the Robert Pow to tow her, and that, in disobedience of the pilot's orders, the master of the tug so towed the *Ilma* that she took ground and received damage, and prayed the Court to pronounce for such damage. It was objected that the Court had not jurisdiction; that the case was no cause of collision and no case of damage proper, but was a suit for breach of contract. The Court said it was obvious that the damage was occasioned by the negligence of those on board the tug, and was no doubt a breach of the contract that the towage service should be properly performed; but, on the other hand, there was no collision of any kind between the two vessels, and the question was whether the Court of Admiralty, under the seventh section of the Admiralty Act of 1861, had jurisdiction to try the case. The words of the seventh section are: "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." The Court said that, as to the terms "claims in the nature of damage," in the statute 3 & 4 Victoria, c. 65, or "damage," under section 7 of the Admiralty Act of 1861, the word "damage" must be taken accord-

(1) Br. & Lush. 99.

ing to the well understood meaning of the phrase in the Admiralty Court, namely, "damage done by collision." The petition was rejected with costs.

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The last case on the subject is *The Victoria* (1), reported in January, 1887. The plaintiffs in this case were owners of cargo laden in the *Victoria*. The cargo had been injured by a collision between the *Victoria* and the *Cervin*, for which the *Victoria* was pronounced solely to blame in an action between her owners and the *Cervin*. The *Victoria* was bound from the East Indies to Havre, calling at Malta for orders. The collision took place before reaching Malta. All her cargo was discharged at Havre. Plaintiffs commenced an action *in rem* against the *Victoria* for damage to cargo, and she was arrested on the action. For the defendant it was contended there was no jurisdiction in the Court to entertain the action; that the Admiralty Act of 1861, sec. 7, applied only to damages done by a vessel to something with which it can come in contact, and not to cargo on board. Butt, J., said: "I am clearly of opinion that this is an attempt to extend the jurisdiction *in rem* of this Court, which is neither warranted by section 7 nor by the intention with which that section was framed. The damage, the subject of this action, is not 'damage' within the meaning of section 7." Action dismissed.

As the words of section 6 of the Vice-Admiralty Act, under which this suit is brought, are in every respect similar to those of section 7 of the English Admiralty Act of 1861, upon which these two decisions were made, I must hold these cases as conclusive authorities against the claim of the plaintiff in the present action. Holding this view, it is useless to discuss or express any opinion upon the other questions raised in the case. I therefore pronounce for the defendant, with costs.

Decree accordingly.

For a citation of cases as to injury to the person, see *The Teddington*, ante, p. 52.

It will be noted that counsel for defendants in the principal case raised substantially two ob-

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jections to the plaintiff's action :

(1) That the Court had no jurisdiction in a case of this nature, as the injury complained of was not a damage done by the ship ;
 (2) That the plaintiff was not in the employ of the ship, but in Callaghan's employ, and there was no duty in any way arising from the ship towards the plaintiff. The learned judge decided the case upon the first ground, holding that the Court, under the circumstances of the case, had no jurisdiction, without considering the second point. The judgment is based upon the authority of *The Robert Pow*, Br. & Lush. 99; and *The Victoria*, 12 P. D. 105. *The Robert Pow* was decided by Dr. Lushington in 1863, and it was there held that the Court of Admiralty has not jurisdiction under 3 & 4 Vict., c. 65, sec. 6, or 24 Vict., c. 10, sec. 7, or otherwise, to entertain a claim against a steam-tug for damage occasioned to the vessel towed by negligence in towing, if the damage arises not by collision, but by the vessel taking the ground. The same judge, in *The Nightwatch*, Lush. 542 (1862), held that where, by the improper navigation of a steam-tug towing a vessel, the vessel came into collision with another vessel, and was injured, it was damage done by the steam-tug, and that the owners of the vessel towed could proceed in the Admiralty against

the tug. In *Williams & Bruce* (ed. 1886), p 73, note (m), the learned editors say : " It is difficult to discover the principle of the distinction in the two cases. The cases may be reconciled by supposing that the Court considered that in the one case there was evidence of actionable negligence independently of any breach of contract, and that in the other case the cause of action rested simply upon breach of contract. At the same time it is difficult to see what evidence there was of actionable negligence independently of contract in the case of *The Nightwatch*. Although in the judgment in *The Robert Pow*, Dr. Lushington seemed to attach a limited and technical meaning to the word *damage* used in the statutes, it is submitted that the decision must rest upon some broader principle." In view of recent decisions, *The Robert Pow* cannot now be looked upon as sound law. In the subsequent case of *The Maggie M.*, post, Watters, J., declined to follow it, saying : " It does not appear to have been followed by any subsequent case." From this it is evident the learned judge subsequently considered the Vice-Admiralty Court had jurisdiction to entertain a suit for damage such as that preferred by the plaintiff in the principal case. In *The Ida*, Lush. 6 (1860), Dr. Lushington held that the Court " has

never exercised a general jurisdiction over damage, but over causes of collision only"; and in *The Sarah*, Lush. 549 (1862), the same learned judge held that the Court of Admiralty has original jurisdiction over torts committed on the high seas, and therefore over a collision on the high seas, when the vessel doing the damage was a keel, or vessel without masts, usually propelled by a pole. It is difficult to reconcile these judgments. In *The Uhla*, L. R. 2 A. & E. 29 (1867), it was held that the Court had jurisdiction in a case of damage done by a ship to a breakwater. The case of *The Excelsior*, L. R. 2 A. & E. 268 (1868), was where a vessel, against the will of the master, was moved by directions of a dock master to another part of the harbor—from the eastern to the western pier. While at the western pier a gale sprung up, the vessel broke from her moorings, and did considerable damage to the wharf. It was held that the vessel was liable for the damage. It was also held in *The Energy*, L. R. 3 A. & E. 48 (1870), that the Court has jurisdiction to entertain a suit instituted by the owners of a vessel against a steam-tug engaged to tow the vessel for negligently towing her so as to cause her to come into collision with and do damage to another vessel. In *The Industrie*, L. R. 3

A. & E. 303 (1871), there was no collision between the two vessels at all, and yet the offending vessel was held liable for the damage. The plaintiffs' vessel was entering the harbor of Hartlepool. The *Industrie* was, through the negligence of those on board of her, lying across the channel or fair-way. The plaintiffs' vessel, in taking necessary measures to avoid a collision, took the ground, and drove against the town wall and sustained damage, and also did damage to the wall. It was held the Court had jurisdiction. See also *The Chase*, Young's Ad. Dec. 113 (1872). A steamship which sank another craft by the swell raised by her excessive speed was held liable for damages. *The Batavier*, 1 Spinks, 378; s. c. 9 Moo. P. C. 286.

A case of much importance on Admiralty jurisdiction has recently been decided by the House of Lords. The plaintiffs brought an action *in personam* in the Admiralty Division of the High Court against a Dock Company for injuries to the amount of £221 4s. 6d. to their steamship, by a collision with the dock wall, occasioned by the negligence of the Dock Company. The Court found the Company liable for the damage, but refused the plaintiffs their costs on the ground that the action ought to have been brought in the County Court exercising

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Admiralty jurisdiction where the cause of action arose; *The Zeta* (1891), P. 216. The case was taken to the Court of Appeal, and is reported as *Turner v. Mersey Docks and Harbor Board*, (1892), P. 285. The Court of Appeal, Lord Esher, M. R., and Lopes, L. J. (Fry, L. J., dissenting), reversed the decision of the President, holding that the costs should not be disallowed on the ground assigned in the Court below, as neither the Admiralty Court nor the Admiralty side of a County Court had jurisdiction to entertain the action, which could only have been tried by the judge of that division sitting as a judge of the High Court. The effect of this judgment was to largely restrict the jurisdiction of the Admiralty Court if it had remained unreversed. Leave was given to appeal to the House of Lords, and in August, 1893, the judgment of the Lords reversed the decision of the Court of Appeal and restored that of the President; *Mersey Docks and Harbor Board v. Turner*, (1893), A. C. 468; s. c. 9 Times L. R. 624. Lord Herschell, L. C., in his judgment, exhaustively examines the cases and upholds the jurisdiction of the Admiralty Court. After pointing out the conflicting statements of the law, as laid down by Dr. Lushington in *The Ida*, *The Robert Pow*, and *The Sarah*, the Lord Chancellor says,

p. 481: "If I am to estimate the relative weight of these conflicting statements of the law, it seems to me that the view expressed in the late case of *The Sarah* is more important and authoritative. It was the ground, and the sole ground, upon which the Court assumed jurisdiction and rejected the protest. It may not have been necessary to go the length of asserting jurisdiction in the case of damage caused by all torts committed upon the high seas, but it was essential that the jurisdiction should cover something more than damage caused by collision between ships. My Lords, when I turn to prior authorities (and I have examined every one which the researches of the learned counsel brought to the notice of the House), I can find no authority which supports the limitation of the jurisdiction of the Court of Admiralty laid down in the case of *The Ida* and *The Robert Pow*." In discussing the meaning to be given to the word "damage," he further said, p. 485: "It is not necessary in the present case to determine the bounds of the jurisdiction exercisable by the Court of Admiralty as regards torts committed on the high seas. It is enough to say that I cannot regard it as established that in the year 1840 its jurisdiction in the case of damage received by a ship was limited to damage received by collision with an-

other vessel. I can find no ground, either on principle or authority, for such a limitation, nor is it necessary to decide whether the Court of Admiralty possessed jurisdiction in a case similar to the present prior to the Act of 1840, supposing the damage had been sustained upon the high seas. For the reasons I have stated, I have come to the conclusion that it is impossible to maintain the proposition that the word 'damage' was, according to the well understood meaning of the phrase in the Admiralty Court, confined to damage due to collision between two ships. This proposition was the sole justification alleged, and I can see no other, for giving to the language of that statute the very restricted interpretation adopted by Dr. Lushington. Even if its operation, when the words are construed according to their natural meaning, be to enlarge the jurisdiction of the Court of Admiralty in the case of damage received by a ship upon the high seas, there is nothing in the frame of the enactment to indicate that this was not the intention of the Legislature, though no doubt its chief object may have been to extend the jurisdiction which existed in the case of damage received by ships upon the high seas to damage received in the body of a county." In the case of *The Queen v. The Judge of*

the City of London Court (1892), 1 Q. B. 273, it was held that the High Court of Admiralty had no jurisdiction to entertain an action *in personam* against a pilot in respect of a collision between two ships on the high seas caused by his negligence. In this case Lord Esher, M. R., delivered a masterly judgment reviewing the jurisdiction of the Court, dissenting from the celebrated judgment of Story, J., in *DeLovio v. Boit*, 2 Gall. 398, and in large measure repudiating the existence of the enlarged jurisdiction claimed for the Court. Lord Herschell, in continuance of his judgment in the Lords, p. 486, says: "I do not think it necessary to discuss the case of *The Queen v. The Judge of the City of London Court* (1892), 1 Q. B. 273, or other cases in which it was held that the Court of Admiralty had not jurisdiction to entertain a suit for damage caused by the wrongful act of the pilot. In that and the other cases relating to suits instituted in respect of the negligence of pilots, stress was laid on certain considerations which do not touch the case with which your Lordships have to deal, and I agree with Lord Justice Fry in thinking that the decision in *The Queen v. The Judge of the City of London Court* was not decisive of the present case. At the same time I am, of course, aware that the views which I

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have expressed conflict with some of the broader grounds upon which the Master of the Rolls based his judgment in that case, and the fact that I am thus differing from that learned judge has made me consider the matter all the more anxiously. I ought to notice one argument which was regarded as of weight by two of the learned judges in the Court below. It was said that no disaster similar to that which gave rise to the present action could have occurred on the high seas, and that therefore the Court of Admiralty could not have had jurisdiction in such a case, and has not now jurisdiction by virtue of the statute of 1840, when the occurrence takes place within the body of a county. I am unable to entertain this view. I think that a vessel might, by the negligence of the owner of a fixed object, come into collision with it, and thus sustain damage. Such cases are quite conceivable, although, of course, not likely frequently to occur. The argument that according to the rule of the Court of Admiralty, where both parties are in fault the damage is divided, and that this rule could not well be applied where a vessel is damaged by collision with a dock wall, appears to have weighed a good deal with the Court below. But it appears to me that the difficulty would be precisely the same where the

damage was caused by the ship and not received by it, as, for example, in the case of *The Uhla*, L. R. 2 A. & E. 29 n., and others of the cases cited, and yet the suggested difficulty has not prevented the numerous decisions to which I have alluded in favor of a construction of the Act of 1861 similar to that now contended for in the case of the Act of 1840. The true answer probably is, and it would be of equal weight in both cases, that the rule referred to has never been applied except in the case of a collision between two ships." It is submitted *The Robert Pow* must now be considered overruled. The judgment of the House of Lords in *Mersey Docks and Harbor Board v. Turner*, *supra*, has also, it is submitted, established that the Admiralty Court has jurisdiction to entertain a suit, (1) for damage by collision between two vessels, (2) for damage done by a ship to persons and things other than ships, (3) for damage done to a ship by a barge, pier, dock wall, or other object, through the negligence of those having the same in charge. In *Monaghan v. Horn*, 7 Can. S. C. R. 409 (1882), on appeal from the Maritime Court of Ontario, it was held (Fournier and Taschereau, JJ., dissenting), that the Maritime Court of Ontario has no jurisdiction apart from R. S. O. c. 128 (re-enacting in that Province

Lord Campbell's Act, 9 & 10 Vict., c. 93), in an action for personal injury resulting in death, and therefore the appellant had no *locus standi*, not having brought the action as the personal representative of the child. The action was *in rem* against the steamboat, *The Garland*, by whose negligence the death was caused. It was further held by a majority of the Court reversing the Maritime Court of Ontario that the Court had authority to entertain the suit, as such jurisdiction was held by the High Court of Admiralty in England. This case was decided prior to *The Vera Cruz*, 10 App. Cas. 59 (1884), and so far as it is at variance with the latter case must be considered overruled. In the case of *The Vera Cruz* it was held that an action *in rem* did not lie under Lord Campbell's Act. In the latter case the suit was begun in the name of the administratrix of the deceased. But in *The Bernina*, 13 App. Cas. 1, the Court upheld an action *in personam* against the owners for damages for loss of life. A collision took place between two steamers, the *Bernina* and the *Bushire*, which was occasioned by the fault of the masters and crews of both vessels. One of the crew and a passenger on the *Bushire* were drowned, neither of whom had anything to do with the negligent navigation of

the vessels. The representatives of the deceased, having brought an action *in personam* against the owners of the *Bernina* under Lord Campbell's Act, it was held the deceased persons were not identified with those navigating the *Bushire* in respect of the negligent navigation; that the action was maintainable; and that the whole damages were recoverable, the Admiralty rule as to half damages not applying under Lord Campbell's Act.

AMERICAN CASES.

The Supreme Court of the United States, in *The Max Morris*, 137 U. S. 1, decided that where a person is injured on a vessel while in the employ of a stevedore, putting coal on board, through a marine tort arising partly from the negligence of the officers of the vessel, and partly from his own negligence, he is entitled to recover in Admiralty, but whether the decree should be for exactly one-half of the damages sustained, or for a greater or less sum than one-half, in the discretion of the Court, was left undecided, the special case not requiring the decision of that point. In *Leathers v. Blessing*, 105 U. S. 626, it was held that the term "torts," when used in reference to Admiralty jurisdiction, embraces not only wrongs committed by direct force, but such as are suffered in consequence of negli-

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gence or malfeasance, when the remedy at common law is by an action on the case. The jurisdiction in Admiralty is not ousted by the fact that where the wrong was done on board the vessel by the negligence of the master she had completed her voyage, and was safely moored at her wharf, where her cargo was about to be discharged. In this case the plaintiff brought an action *in personam* against the owners of the vessel for injury sustained on board the vessel by a bale of cotton falling on him. As was customary, plaintiff went on board to look after freight he expected by the vessel, and in going along a passageway the accident happened which caused the injury. See also Henry, Ad. 31. *In ex parte Gordon*, 104 U. S. 515, a writ of prohibition was refused to a District Court of the United States, sitting in Admiralty, wherein a libel claiming damages was filed against a steamer for drowning certain seamen of a vessel with which, as she was navigating the public waters of the United States, the steamer, as was alleged, wrongfully collided. Waite, C. J., at p. 517, in delivering judgment, says: "The suit is for damages growing out of the collision. Having jurisdiction in respect to the collision, it would seem necessarily to follow that the Court had jurisdiction to hear and

decide what liability the vessel had incurred thereby." And again on p. 518: "So here, the Court of Admiralty has jurisdiction of the vessel and the subject matter of the action, to wit, the collision. It is competent to try the facts, and as we think, to determine whether, since the Common Law Courts in England, and to a large extent in the United States, are permitted to estimate the damages which a particular person has sustained by the wrongful killing of another, the Courts of Admiralty may not do the same thing. If the District Court entertains such a suit, an appeal lies from its decree to the Circuit Court, and from there here, if the value of the matter in dispute is sufficient. Under these circumstances it seems to us clear that the Admiralty Courts are competent to determine all the questions involved, and that we ought not to issue the prohibition asked for." This case, however, does not appear to have been followed in subsequent cases. In the District Court of Louisiana it was held that an action for damages for the loss of a human life, caused by a maritime tort, survives in the Admiralty. Where the statute of a State gives a right of action for loss of human life, and such a loss occurs by reason of the tort of the vessel upon the high seas, whose owners re-

side in that State, and whose home port is in that State, such vessel was a part of the territory of that State, and its Courts would entertain an action under the statute against the owners for the wrongful conduct of their agents on the high seas which resulted in loss of human life. A Court of Admiralty can enforce such right of action in a proceeding *in rem*. *The E. B. Ward, Jr.*, 17 Fed. Rep. 456 (1883). In a District Court of Virginia it has been held that a State statute cannot create a maritime right. A proceeding *in rem* brought by the administrator against the ship was dismissed. The fact that the statute gives a right of action *in personam* does not thereby give a right of action *in rem* in a similar case in Admiralty. *The Manhasset*, 19 Fed. Rep. 918 (1884). The Admiralty jurisdiction as to damages from loss of human life has recently been considered by the Supreme Court of the United States, and that high Court agrees with the House of Lords in *The Vera Cruz*, 10 App. Cas. 59. In the absence of an Act of Congress or a statute of a State giving a right of action therefor, a suit in Admiralty cannot be maintained in the Courts of the United States to recover damages for the death of a human being on the high seas, or on waters navigable from the sea,

which is caused by negligence. *The Harrisburg*, 119 U. S. 199 (1886). This view was reaffirmed in *The Alaska*, 130 U. S. 201 (1889), where it was held, in the absence of an Act of Congress or of a statute of a State giving a right of action therefor, a suit in Admiralty cannot be maintained for damage sustained by loss of human life. Again, in 1891, the same Court held that a District Court sitting in Admiralty cannot entertain a libel *in rem* for damage incurred by loss of life where, by the local law, a right of action survives to the administrator or relatives of the deceased, but no lien is expressly created by the Act. *The Corsair*, 145 U. S. 336. In these cases the English and American decisions are cited and discussed.

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EMPLOYER'S LIABILITY.

In the case of *The Enrique*, Watters, J., dismissed the plaintiff's suit upon the ground that the Court had no jurisdiction. The other objections urged in defence were not considered. It may, however, be useful to refer to some recent leading cases upon the employer's liability to his servant. In an action to recover damages for injury caused by the negligence of the defendant's servant, the defence of common employment is not applicable unless the injured person, and the servant whose

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negligence caused the injury, were not only engaged in a common employment, but were in the service of a common master. *Johnson v. Lindsay* (1891) A. C. 371. This decision of the House of Lords was followed by the Privy Council in *Cameron v. Nystrom* (1893) A. C. 308. This was an action on appeal from the Court of Appeal of New Zealand to recover damages for injury caused by the defendant's servant. The defence of common employment was held not applicable unless the plaintiff was at the time of the injury in the defendant's actual employment in the relationship of master and servant. Where the defendants were stevedores, the plaintiff a servant of the shipmaster on whose vessel the injury was caused, and the person whose negligence caused the injury was a servant of the stevedore, held that the defence of common employment was not available. Lord Herschell, L. C., at p. 310, says: "It is to be observed that the question of common employment only arises as a defence, on the assumption that the person who did the injury was the servant of the person sued. Unless this be the case, the person sued is under no liability, because he is sued in respect of an injury not caused by himself or by anyone for whom he is responsible. And therefore common employment only becomes necessary as

a defence, and is only relevant when the person doing the injury is a servant of the person sued." The case of *Donovan v. Laing, Wharton, and Down Construction Syndicate*, (1893), 1 Q. B. 629, in the Court of Appeal, is an important one. The defendants contracted to lend to a firm who were engaged in loading a ship at their wharf a crane with a man in charge of it. The man in charge of the crane received directions from the firm or their servants as to the working of the crane, and the defendants had no control in the matter. The plaintiff, who was a servant of the wharfingers, and was employed by them to direct the working of the crane, sustained an injury through being struck by it by reason of the negligence of the man in charge, and sued the defendants on the ground that the negligence was the act of their servant. But, *held*, that though the man in charge of the crane remained the general servant of the defendants, yet, as they had parted with the power of controlling him with regard to the matter on which he was engaged, they were not liable for his negligence while so employed. Lord Esher, M. R., at p. 632, says: "For some purposes, no doubt, the man was the servant of the defendants. Probably, if he had let the crane get out of order by his neglect, and in consequence any one was in-

jured thereby, the defendants might be liable; but the accident in this case did not happen from that cause, but from the manner of working the crane. The man was bound to work the crane according to the orders and under the entire and absolute control of Jones & Co."—the parties who were loading the vessel. In *Brown v. Leclerc*, 22 Can. S. C. R. 53, it was held that where two stevedores are independently engaged in loading the same steamer, and owing to the negligence of the employees of one, an employee of the other is injured, the former stevedore is liable in damages for such injury. The failure to observe a precaution usually taken in and about such work is evidence of negligence. In *Heaven v. Pender*, 11 Q. B. D. 503 (1883), the defendant, a dock owner, supplied and put up a staging outside a ship in his dock under a contract with the shipowner. The plaintiff was a workman in the employ of a ship-painter who had contracted with the shipowner to paint the outside of the ship, and in order to do the painting the plaintiff went on and used the staging, when one of the ropes by which it was slung, being unfit for use when supplied by the defendant, broke, and by reason thereof the plaintiff fell into the dock and was

injured. Held, reversing the decision of the Queen's Bench Division, that the plaintiff, being engaged on work on the vessel in the performance of which the defendant, as dock owner, was interested, the defendant was under an obligation to him to take reasonable care that at the time he supplied the staging and ropes they were in a fit state to be used, and that for the neglect of such duty the defendant was liable to the plaintiff for the injury he had sustained. Held, also, by Brett, M. R., that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense, who did think, would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. See also *McDonald v. McFee*, 3 Pugsley 159; *Wood v. Pitfield*, 26 N. B. 210; *Smith v. Baker*, (1891), A. C. 325.

The United States District Court of Louisiana, in *The Para*, 56 Fed. Rep. 241, has held that a ship is liable in damages to a stevedore's employee who is injured through the insufficiency of the tackle provided by the ship for hoisting cargo.

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THE NORDCAP—WALLOE.

Salvage—Assignment of Claims—Order of Payment.

A salvage service having been rendered a foreign vessel, which had gone ashore near Point Escuminac, near Miramichi Bay, in an action for the recovery of the amount of such service,

Held:—That the costs should be paid first out of the fund in Court, then the amount awarded as salvage services, and any balance to the owners, as the seamen had been paid.

A Norwegian vessel, the Nordcap, on Sunday morning, September 23rd, 1888, went ashore at or near Point Escuminac, twenty-eight miles from Chatham, N. B. The wind at the time was blowing about thirty miles an hour. The vessel was in ballast from Bordeaux, and ninety-three days out at the time of the accident. She was signalled from the light-house on Point Escuminac to keep off, and then headed up the bay, striking the reef soon after. The main and mizzen masts were cut away, as it was feared the vessel would upset while thumping over the reef. The crew refused to stay by the ship, and, taking their personal effects out, left and went ashore. Intelligence reached Chatham on Sunday morning that the vessel was ashore, and the plaintiff, J. B. Snowball, at once despatched his tug, the St. Andrew, to her assistance. When the tug got outside the bar, it was found the sea was too heavy to get alongside the vessel, and the tug then came inside the mouth of the harbor and waited till Monday morning, the 24th. The weather had then somewhat moderated, and the tug reached the vessel about 7 or 8 o'clock that morning. No one was on board the vessel at the time, and the main and mizzen masts were afloat about one hundred and fifty fathoms distant from the ship. The vessel drew about thirteen feet of water, and was aground in about eleven feet of water. The master of the tug went ashore and telegraphed to the plaintiff for further assistance. He sent two other tugs, with their crews, and eleven men in addition, to assist in pulling

the vessel off. They reached the scene of the accident on Monday about 2 p. m., and remained till the vessel was got afloat. Ballast was discharged on Monday, and the vessel moved about thirty feet. More ballast was discharged on Tuesday, and about 5.30 p. m. of that day the vessel was got off, and towed to Chatham by the tug St. Andrew. The other tugs towed the masts and rigging to the same place. From the evidence, it appeared that the wind began to blow from the east pretty hard on the following day—Wednesday—toward the land, and if the vessel had not been got off on Tuesday she would have been driven further ashore and greatly damaged, if not broken up entirely. The evidence was that the charge for a tug is \$50 a tide, or \$100 a day when it works by the day. The master of the vessel, who was also part owner, after considerable negotiation, accepted \$210 from the plaintiff, and released, so far as he could, any right he and the other owners had in the vessel. Out of this amount the wages of the seamen were paid in full, and the plaintiff, to secure his claim and get title to the vessel by process of law, arrested the vessel for the salvage services, claiming \$2,000. The evidence showed the value of the salved vessel in her then condition to be not more than \$800.

C. A. Palmer, for plaintiff; *W. C. Winslow*, for the master and owners.

And now (Oct. 6th, A. D. 1888),

WATERS, J., after hearing the parties, valued the vessel at \$800, and allowed the salvors \$400 and costs. It was also ordered that a commission of sale should issue for the sale of the vessel, and that the proceeds should be brought into the registry, after which further directions would be given as to the distribution of the amount.

On a subsequent day (Oct. 22, 1888), the Registrar reported that a commission of sale had issued; that the vessel had been sold under the directions of the Marshal; and that the plaintiff had purchased the vessel for the sum of \$1,050, which amount had been paid into the registry.

Mr. Palmer, on behalf of the plaintiff, moved for a distribution of the proceeds of sale.

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WATTERS, J. The proceeds of sale will be distributed as follows: (1) The costs of the plaintiff in the suit; (2) the salvage award of \$400 to the plaintiff; (3) any surplus to be paid to the defendant's solicitor as representative of the owners, as it appears the seamen have all been paid.

Ordered accordingly.

For citation of cases as to salvage see note to *The St. Cloud*, ante p. 145, *et seq.* Proceedings can be had against the owners of the ship or property salvaged personally, as well as against the *res* for the recovery of salvage remuneration; *The Hope*, 3 C. Rob. 215; and there is no distinction between river and sea salvage; *The Carrier Dove*, 2 Moo. P. C. N. S. 243. The value of the salving ship in all cases will enter into the consideration of fixing the amount; *The Otto Hermann*, 33 L. J. Ad. 189; also the danger incurred, the probable vitiation of insurance policy on account of deviation, the liability of shipowner to owners of cargo; *The Sir Ralph Abercrombie*, L. R. 1 P. C. 454; and in the case of mail steamers, the penalties incurred under the contract for deviation; *The Silesia*, 5 P. D. 177; and especially when human life was in danger; *The Skibladner*, 3 P. D. 24. Formerly salvage reward was principally given for labor and skill in actual services rendered to a vessel

in distress without particular regard to the claims of the owner of the salving ship; *The Two Friends*, 2 W. Rob. 349; *The Enchantress*, Lush. 93. The Court has full power to apportion the amounts not only among the different interests of owner, master and crew of a salving ship, but also where there are different sets of salvors; *The Livietta*, 8 P. D. 24. While an appeal lies to the Court of Appeal to review the award of the Admiralty Division, the Court of Appeal will only interfere in exceptional cases; *The England*, L. R. 2 P. C. 253; *The Woburn Abbey*, 21 L. T. 707; *The Lancaster*, 9 P. D. 14; *The Glenduror*, L. R. 3 P. C. 589. In the latter case it was held there must be a difference of at least one-third before it will interfere. The same principle is observed in appeals from Vice-Admiralty Courts to the Privy Council; *The Castlewood*, 42 L. T. 702; *The De Bay*, 8 App. Cas. 559. See also Newson on Salvage, p. 99, *et seq.*

THE HATTIE E. KING—COLLINS.

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March 7.

Towage—Combination Rates—Not Illegal.

The owners of tug-boats plying in the harbor of St. John, N. B., entered into an agreement to charge a uniform rate for towage services, and specified the amounts for the different tows. The effect was to materially increase the rates over former years, when there was free competition and cut rates. The plaintiffs' tug, at the request of the master of the H. E. K., rendered to the vessel towage services, and they charged the combination rates. The vessel owner offered to pay what he had paid in former years for like services, and refused to pay more, claiming the combination rates were against public policy and illegal.

Held, That as the charges were reasonable and fair for the services performed the plaintiffs were entitled to recover the full amount claimed.

The owners of tug-boats plying in the harbor of St. John, N. B., in the year 1889, entered into an agreement to maintain a uniform rate for towage services for that year. The effect of the agreement was to materially increase the rates for towage services over former years, when there were cut rates and free competition. The Hattie E. King, an American vessel of 272 tons burthen, registered in the State of Maine, where the owners resided, in that year engaged the plaintiffs' tug—the Doane—to tow the vessel from Rodney wharf, in the harbor of St. John, up through the Falls to King's mills, where she was to load lumber for the American market. The vessel was accordingly towed to the mills on April 2nd. By request of the master of the vessel, the tug went for her, when loaded, on April 8th, and towed her down through the Falls into the harbor, and out to sea. The card or combination rates for these services were \$11 for the tow up, and \$12 for the tow down, in all \$23, and this latter amount was charged and claimed from the owners of the vessel. The vessel owners refused to pay this amount, claiming that the combination rate was higher than in former years, and that it was illegal for the owners of tugs to combine, and by that means sensibly increase the rates over

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former years. They offered to pay \$13 in full for the services performed, and insisted that similar services had been performed for that amount in former years under free competition. It was proved on the hearing by several owners of tugs that the rates obtained in former years had been unremunerative; that the card or combination rates were not excessive, but were only fair and reasonable for the services performed; and that the plaintiffs' charge of \$23 was moderate and reasonable.

C. A. Palmer, for plaintiffs, the owners of the tug, claimed that where there is no agreement as to the amount, a fair and reasonable remuneration for the towage services rendered will be allowed. *Newson on Salvage*, &c. (ed. 1886, p. 147). The Vice-Admiralty Court has jurisdiction to entertain the suit. *The Peerless* (1); towage has a priority over salvage, pilotage or bottomry. *The Constancia* (2), *Desty*. Shipping and Ad, ss. 87, 88, 89. The master has a right to make a contract for towage when the vessel is not in her home port, as in this case.

James Stratton, for the vessel and owners. The question for decision is one of fact. Is the sum of \$13 a reasonable amount for the services performed? The suit should not have been brought in this Court, but in the City Court of St. John. What was the market rate for the year 1888? The combination among the tug-boat owners is in restraint of trade, and illegal. *Hilton v. Eckersley* (3); *Hornby v. Close* (4). In former years the same work was done for \$12, and the test of what is reasonable is what the work could be done for when there was no combination.

Palmer, in reply. What the defendants paid in former years was no criterion in this case. There was no evidence of any restraint of trade. The defendants knew what the rates were before the tug was engaged. Tug owners have a right to agree among themselves as to rates, and to say they will not tow for less. There is nothing illegal in that.

(1) Lush. 130.

(2) 10 Jur. 845.

(3) 6 E. & B. 47 s. c.; 25 L. J. Q. B. 199.

(4) L. R. 2 Q. B. 153.

WATTERS, J. I decide in this case in favor of the plaintiffs, and assess the amount at \$23—the full sum claimed. I have no doubt as to the jurisdiction of the Court to entertain this suit. The evidence shows that towage services were performed by the plaintiffs for the defendants, and at their request. It further appears that the amount claimed for these services is fair and reasonable, although in former years similar services were performed for smaller sums. Then there was keen competition and cut rates, and the owners of tugs have given in evidence that under these rates they lost money, or at least did not make any.

As the sum in dispute in this case is small, I shall only allow half costs to all parties, except to the witnesses, who are to be paid their full fees.

Decree accordingly.

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Upon the question of illegal combination in restraint of trade, and conspiracy to injure a rival in business, *The Mogul Steamship Co. v. McGregor*, is a leading and important case. It passed through the different Courts to the House of Lords, and was elaborately argued by able counsel, and was fully considered in the judgments of the several Courts. Application was first made for an interlocutory or interim injunction against the defendants, which was refused, 15 Q. B. D. 476. The action was then tried before Lord Coleridge, C. J., without a jury, in which the plaintiffs' claimed damages for a conspiracy to prevent them from carrying on their trade between London and China, and an injunction against the

continuance of the alleged wrongful acts, in which judgment was given in favor of the defendants, 21 Q. B. D. 544; and this was sustained by the Court of Appeal per Bowen and Fry, L. JJ., (Lord Esher, M. R., dissenting), 23 Q. B. D. 598. Upon appeal to the House of Lords, the judgment of the Court of Appeal was affirmed. The following are the facts:

Owners of ships, in order to secure a carrying trade exclusively for themselves and at profitable rates, formed an association, and agreed that the number of ships to be sent by members of the association to the loading port, the division of cargoes and freights to be demanded, should be the subject of regulation; that a rebate of

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5 per cent. on the freights should be allowed to all shippers who shipped only with members; and that agents of members should be prohibited on pain of dismissal from acting in the interest of competing shipowners; any member to be at liberty to withdraw on giving certain notices.

The plaintiffs, who were shipowners excluded from the association, sent ships to the loading port to endeavor to obtain cargoes. The associated owners thereupon sent more ships to the port, underbid the plaintiffs, and reduced freights so low that the plaintiffs were obliged to carry at unremunerative rates. They also threatened to dismiss certain agents if they loaded the plaintiffs' ships, and circulated a notice that the rebate of 5 per cent. would not be allowed to any person who shipped cargoes on the plaintiffs' vessels. The plaintiffs having brought an action for damages against the associated owners alleging a conspiracy to injure the plaintiffs: *Held*, affirming the decision of the Court of Appeal (23 Q. B. D. 598), that since the acts of the defendants were done with the lawful object of protecting and extending their trade and increasing their profits, and since they had not employed any unlawful means, the plaintiffs had no cause of action; (1892) A. C. 25. See *The Electric Dispatch Co. of Toronto v. The Bell*

Telephone Co. of Canada, 20 Can. S. C. R. 83.

The case of *Pratt v. Tapley*, 3 Pugsley 163, was an action against defendant, owner of a tug-boat in the harbor of St. John, for breach of an agreement entered into between the proprietors of sixteen tug-boats respecting the towage of vessels, according to what was known as "The regular turn system." By this they agreed, among other things, that every tug-boat should take its regular turn in order; that every ship coming into the harbor should count as such turn; and that such tug should be entitled to all her towage till she went to sea; that on arrival of a vessel at Partridge Island, the tug, whose turn it might be, must be prepared to attend the vessel or lose her turn, the next tug in order taking the vessel. If more than one vessel arrived, the tug whose turn it might be should have the option of choosing the largest vessel, the next in turn to choose from the remainder. That all new vessels up or down the Bay of Fundy, beyond Quaco or Musquash, should be towed on special terms to Partridge Island, and on arrival there should be towed into the harbor by the steam tug, and should, in falling to said tug's general turn, count as such; but if the vessel did not fall to said tug's general turn, then it should be allowed to said tug as a gen-

eral turn ahead; and all tugs on the general turn list ahead of such tug, which had not their general turn, should take the next vessel arriving as their turn. The agreement then prescribed the order of tugs for new vessels beyond Quaco and Musquash. The breach of agreement complained of was that a new vessel beyond Quaco required to be towed into the harbor; that it was the turn of the plaintiff's tug to do the towing, according to the agreement; but that the defendant, contrary to the agreement, towed the vessel into the harbor with his tug, and afterwards towed her to sea, though the plaintiff was ready and willing to do the work. On demurrer the Court held the agreement to be void, as being contrary to public policy and in restraint of the freedom of trade, the parties having restricted themselves from carrying on

their own choice, but according to the will of others; and that the interest of the public, particularly of shipowners, would be prejudiced by giving effect to such an agreement.

A contract by which a railroad company agreed that an elevator company should, in consideration of the erection of an elevator, have the handling of all through grain brought by the railroad company to a certain point, and receive a fixed price therefor, is not repugnant to the commercial power of Congress nor to public policy; *Dubuque & S. C. R. R. Co. v. Richmond*, 19 Wall. 584. An agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable, and there be a consideration to support it; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64.

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July 8.

THE FRIER—SORENSEN.

Salvage—Two Vessels Lashed Together—Tug Taking Hold of One—Liability of Other.

Two vessels—the F. and the A.—were moored to a buoy on the north of the harbor of St. John, N. B. They were fastened together, and during the night broke loose by reason of the buoy becoming detached from its mooring, and they drifted bow foremost down the harbor. All on board the vessels were asleep. The plaintiffs' tug gave the alarm to those on board the vessels, and, by fastening on to the A., towed both vessels out into the harbor and left them in a place of safety.

Held:—That the services rendered under the circumstances were salvage services, and although the tug had not in fact fastened a line to the F., yet salvage services had been rendered her, for which she was liable, and that the owners of the tug could proceed separately against the F. without joining the A. in the action.

Two vessels, the Frier and the Artos, on June 19, A. D. 1890, were moored by hawsers or chains to a buoy in Rankin's eddy, on the north side of the harbor of St. John, N. B. During the night, which was dark, a wind sprung up, the buoy to which they were moored became detached from its fastening, and the two vessels, which were lashed together, began drifting, bow foremost, down stream, the Frier being to the east, next to the wharves on the harbor front, at which several vessels were lying. All hands on board the Frier and Artos were apparently asleep, and were not aware that the vessels had become detached from the mooring buoy until they were aroused by those on board the plaintiffs' tug, which went to their assistance. The tug made fast to the Artos, and as both vessels were lashed together, towed them out into the harbor, where it was safe for them to anchor. The wind at the time was blowing quite a breeze from the north down the harbor, and from the state of the tide and the course of the current, the two vessels, if they had not been taken in charge by the tug, would have collided with the vessels lying at the wharves along the east side of the harbor front. An action for

salvage was instituted separately against the Frier by the owners of the tug, and they were held entitled to recover.

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C. A. Palmer, for the salvors, cited *The Vandyck* (1), showing the liability for salvage services, although no request was made to render assistance; also *Newson on Salvage* (ed. 1886), p. 2; *Desty's Ship. & Ad.*, s. 309; *MacLachlan on Ship.* (ed. 1880), 608.

1. *Allen Jack*, for the vessel, cited *Newson on Salvage*, p. 1; *The Giacomo* (2); *Pritchard's Ad. Dig.*, ss. 458, 459, 460, 461, 465. He contended the service rendered was only a towage service; *The Strathnaver* (3). All leading elements to claim salvage should exist, which did not in this case; there must also be a request for the services on the part of the salved ship; *The Vandyck* (1). The Frier was compelled involuntarily to be towed as soon as the tug took hold of the *Artos*. Merely giving information to the vessels that they were adrift was not sufficient to create a right to salvage. It must be shown that serious damage would happen if the service had not been rendered; *The Harbinger* (4); *The Albion* (5); *The Strathnaver* (3); *The Charlotte* (6). The plaintiffs cannot recover for towage, as they do not claim for that. If there was any claim, it would have to be against both vessels, as they were but one object, and both should be brought into Court.

Palmer, in reply, contended it was not necessary to bring both vessels into Court; *The Vandyck*, *supra*, was an authority in point. There was no claim that there was danger from the vessels being close together, but there was danger of damage happening from running into other vessels moored at the wharves along the east side of the harbor, as the evidence showed the currents and state of tide would bring that about. The person giving necessary information to avoid danger is entitled to salvage reward; *The Strathnaver* (3). There was great danger of collision with other vessels. The master and crew knew nothing of their vessel being

(1) 7 P. D. 42.

(2) 3 Hag. 345.

(3) 1 App. Cas. 58.

(4) 16 Jur. 729.

(5) Lush. 282.

(6) 2 W. Rob. 495.

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adrift until hailed by the tug. Salvage can be claimed without demand or acceptance, if rendered; *Newson on Salvage*, 3. Services were rendered; they were meritorious, and the master was notified before action brought that ten per cent. for salvage would be claimed, and that there was no claim for towage.

WATTERS, J. This is an action *in rem* brought by the owners of the tug-boat Richard Doane against the ship Frier. It appears that on June 19th, 1890, the Frier and the Artos were moored to the buoy in Rankin's eddy, so called, on the north side of the harbor of St. John, N. B. During the night the two vessels, which were lashed together, got adrift, by the buoy becoming detached from its fastenings, and they were seen by those on board the tug-boat Richard Doane floating bow foremost down the harbor. When seen by Pilot Stone and the master of the tug they were four or five hundred feet off South wharf. This was about 11 p. m. The vessels were then drifting down the harbor. It appears the master of the Frier went aboard his vessel at half-past ten that night. The argument has been put forward that these vessels, from the state of the tide, would not, on that night, float down the harbor. But we have the fact from the evidence that they did drift down the harbor, and were so found drifting down. They actually did drift down, and that disposes of that contention. The evidence of the harbor master shows that it was the time of freshet, and that in such case the tide sets in towards the wharves on the east side of the harbor. The next question then is, in what condition were these vessels drifting down? They were helpless. It is true persons were on board, but they were asleep. The watch heard a snap, and that, no doubt, was the time they got adrift. The tug overtook them off Lawton's wharf. They must have been a very short time going down to that point. The master of the Frier, shortly after he got on board his vessel, heard a call to the Artos and the whistling of the tug. The shortness of time in floating down shows there must have been great momentum on the part of the vessels. It also shows that they would have occasioned great damage had they floated

against the wharves or against vessels lying moored to these wharves. They were evidently setting in toward the wharves, and must have collided with the vessels there if they had not been stopped. Suppose the tug, when the vessels were first seen drifting down the harbor, had not had sufficient steam on to go to their assistance. It is evident, in such event, they would have gone against the vessels at the wharves or floated out of the harbor to sea. They were, therefore, in great danger. They would have brought up somewhere, and, being fastened together, they might also have done great damage to each other. The persons on board these vessels heard nothing until they were aroused by those on the tug. The tug gave them information, and we cannot tell what damage might have happened if the information had not been given. The wind on the yards, according to the harbor master's evidence, would have taken them with great momentum against the other vessels. Everything shows their position was one of danger. Then as to the law applicable to the case. Salvage can be claimed if any benefit has been received; *Newson on Salvage*, p. 3. These vessels directly received benefit from the services of the tug-boat. As soon as those on board the vessels received information as to their condition, it was the course of prudence to avail themselves of the assistance of the tug. Even giving advice may, under certain circumstances, amount to a salvage service; *The Eliza* (1); *The Persia* (2). How much more, then, in this case, when the tug followed the vessels, aroused those on board, and rendered the necessary assistance. We cannot tell what would have been the effect if the anchors had been dropped. The evidence of Pilot Stone shows that danger was imminent. The very information given by the tug was of service. The tug not only gave information, but anchored the vessels in a place of safety. Was this vessel—the Frier—in a dangerous condition? I must conclude she was. Did the tug contribute to avert the danger? I must hold she did. Then as to the amount to be allowed for the services performed. The maritime law liberally rewards efforts to save property, and that is done

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(1) Lush. 536.

(2) 1 Spinks, 166.

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to stimulate exertions in this direction. The amount of salvage is in the discretion of the Court, having a due regard to all the circumstances of the case, such as value of property, risk run, and work done. The service in this case was meritorious and necessary. I therefore think it would be reasonable to allow the tug, for the services rendered, \$250. I therefore allow the salvors that amount, with costs.

Decree accordingly.

For cases on salvage, see *ante*, pp. 145, 174. Article 29 of the laws of Oleron enjoined the duty of assisting distressed merchants and mariners "in saving their ship-wrecked goods, and that without the least embezzlement, or taking any part thereof from the right owners," and the reward for salvage for such as took pains therein was to be "according to right reason, a good conscience, and as justice shall appoint."

By recent legislation reciprocal salvage rights at present exist between Canada and the United States. The statute of the United States, approved May 24th, 1890, enacts "that Canadian vessels and wrecking appliances may render aid and assistance to Canadian and other vessels, and property wrecked, disabled or in

distress in the waters of the United States contiguous to the Dominion of Canada." This Act was brought into force by the proclamation of the President of the United States, July 28, 1893. The Parliament of Canada passed a law in 1892, 55-56 Vic. c. 4, which enacts in sec. 1, that "United States vessels and wrecking appliances may save any property wrecked, and may render aid and assistance to any vessels wrecked, disabled or in distress, in the waters of Canada contiguous to the United States." This law was brought into force June 1, 1893, by proclamation of the Governor General of Canada. And under sec. 2 of the last named Act "aid and assistance includes all necessary towing incident thereto."

THE MAGGIE M.—MOREY.

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August 22.

Towage—Negligence—Collision—Running Tow against a Bridge—Jurisdiction—Liability.

A tug-boat was engaged by the charterers of a vessel, the E., to tow her from the harbor of St. John, N. B., through the Falls at the mouth of the river, beneath a suspension bridge which spans the Falls at the point where the river flows into the harbor. The vessel towed was chartered to carry a cargo of ice from the loading place above the Falls to New York, and the charterers were to employ the tug and pay for the towage services. The tug, having waited to take another vessel in tow, together with the E., was too late in the tide, and in going under the bridge the topmast of the E. came into collision with the bridge and was damaged.

Held:—That the Court had jurisdiction to entertain the suit; that the delay of the tug in going through the Falls was evidence of negligence; and the tug and owners were condemned in damages and costs.

This was a suit promoted by the owners of the schooner Eric against the tug-boat Maggie M. and owners, claiming \$500 "for damages occasioned by being towed into the Suspension Bridge (so called) at the mouth of the St. John River, in the harbor of St. John, on the 3rd day of May, 1890." The Eric was under charter to carry a cargo of ice from above the Falls to New York. It was a part of the agreement of charter that the charterers should engage the tug and pay for the towage services. The Maggie M., in pursuance of that agreement, was engaged by the agent of the charterers to tow the Eric from the harbor through the Falls, beneath the Suspension Bridge which spans the St. John River at its mouth, where it enters into the harbor of St. John. On the morning of May 3rd, 1890, the tug took the Eric, then being in the harbor, in tow, and went with her as far as Rankin's wharf, in said harbor. Instead of proceeding at once through the Falls, the tug waited till about 9.30 a. m., so that she might at the same time tow another schooner—the Gleaner—through the Falls. About that hour the tug started with both vessels in tow. The length of the Eric's masts from the water's edge to the top

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was 73 feet, and it was in evidence that on the previous day a vessel having masts 77 or 78 feet had safely passed under the bridge. On the way to the bridge the master of the Maggie M. was hailed by the master of another tug coming down through the Falls and told that he was too late, as the tide was then too high to go under the bridge. The Maggie M., however, kept on her course, and in attempting to pass under the bridge the topmast of the Eric came into contact with the bridge and was broken off, and the vessel, in addition, sustained other damage.

The plaintiffs claimed that if the tug had taken the Eric through the Falls as soon as she made fast to her, instead of waiting for the other vessel, there would have been no collision with the bridge. The Eric, in consequence of the accident, lost the charter and was put to expense for repairs. The defendants contended that the Court had no jurisdiction to entertain the suit, as it was not a cause of damage done by a ship. The learned judge, however, upheld the jurisdiction of the Court to entertain the suit, and condemned the tug and owners in damages and costs.

C. A. Palmer for plaintiffs.

C. W. Weldon, Q. C., for the tug and owners.

The following judgment was now (Aug. 22, A. D. 1890) delivered by

WATERS, J. This is an action of damage brought by the owners of the schooner Eric against the steam-tug Maggie M. for negligence in towing the Eric against the Suspension Bridge at the Falls.

About 2nd May last the Mutual Benefit Ice Company of New York, by Mr. James D. Seely, their agent, chartered the schooner Eric to load a cargo of ice at a place above the Falls called the Clifton Ice House; the consideration of the charter was to be \$2 per ton, and free towage to be furnished by the charterers up to the place of loading and back to this harbor. Mr. Seely selected the steam tug Maggie M. to perform this service. On 3rd May the tug took the Eric and another schooner—the Gleaner—in tow, and proceeded towards the Falls, when, the water being too high to allow

the Eric to pass under the bridge, she struck against it and had her foremast head broken off, and sustained other damages. Mr. Weldon contends that, inasmuch as the tug was hired by the charterers and paid by them, there was no contract or mutuality between the owners of the Eric and the tug, and therefore no breach of contract between the Eric and the tug, and he contends that forasmuch as no action would lie by the tug against the Eric for the towage, therefore the owners of the schooner can have no action against the tug for negligence in performing the contract. The schooner was, however, interested in the towing contract, although not a direct party to it; the charterers, in engaging the tug, were only carrying out their part of the contract with the owners of the schooner to furnish the towing power to enable the Eric to pass through the Falls for her cargo. This suit, however, is not one for breach of contract, but is a proceeding *in rem*. I take it that the Eric, having consented to be towed by the Maggie M., although employed by the charterers, it became the duty of the tug to use reasonable care and skill so as to avoid damage happening to the Eric; and if in the performance of her work she negligently towed the schooner against another vessel or a bridge, causing damage, she could be proceeded against *in rem*, and made liable under the statute for "damage done by a ship." The general rule of the maritime law will govern, viz., that there is a right of proceeding *in rem* against the vessel doing damage which cannot be taken away by any voluntary contract with a third party. The case of *The Tasmania* (1), cited by Mr. Weldon, does not apply. In that case, by the course of business, and under the conditions of the notices issued by the steam tug company, of which the plaintiff was a director, he was precluded from bringing an action *in rem* or *in personam* against the Tasmania, which was a steam-tug in the employ of plaintiff's company, and was exempted from liability under the conditions of the company's printed notices.

The case of *The Isca* (2), also cited, was simply an action brought under the Imperial County Court Admiralty Act

(1) 13 P. D. 110.

(2) 12 P. D. 34.

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 MAGGIE M. for breach of a contract of towage, in which the Court held that the tug had been managed in an unseamanlike manner, and the tug was condemned in damages.

The question was also raised that this case does not fall within the words of the statute as "damage done by a ship." It is now held to be immaterial that the mischief complained of is not done directly by the vessel proceeded against. *The Energy* (1) was a suit against a steam-tug engaged to tow a vessel for negligently towing her so as to cause her to come into collision with and do damage to another vessel. So, *The Nightwatch* (2) was a case where, by the improper navigation of a steam-tug, vessel A came into collision with vessel B and sustained damage. It was held that this was damage done by the steam-tug. The Court says: "I must take it that *The Prince*, the vessel towed, was, by the improper navigation of *The Nightwatch*, which was towing her, brought into collision with *The Juliet*. This was damage done by *The Nightwatch*." The case of *The Robert Pow* (3) does not appear to have been followed by any subsequent case. Next, as to the duties of steam-tugs. The law is clearly settled that, when a steam-tug engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so under all circumstances and at all hazards; but she does engage that she will use her best endeavors for that purpose. The steam-tug is not a common carrier or insurer. She is bound, however, to bring to the performance of the duty she assumes reasonable skill and care, and to exercise them in everything she undertakes until it is accomplished. The want of either in such cases is a gross fault, and she is liable to the extent of the full measure of the consequences. Thus a shipowner entrusting his vessel to a steam-tug to be conveyed, as here, through the Falls, has a right to expect that the tug-master possesses the requisite knowledge of the tides and dangers and difficulties of the navigation which he has to meet in the performance of that work; and here I must remark that parts of the evidence show a want of inquiry, study and knowledge on the part of some of the

(1) L. R. 3 A. & E. 48.

(2) Lush. 542.

(3) Br. & Lush. 99.

witnesses engaged in this river towing business relating to distances; to the length of the spars of vessels to be towed; and to the extent of air space between the water and the bridge at the different heights of water—a species of knowledge and information indispensable for tug-masters to study and acquire, in order to ensure the due performance of the work they undertake to perform, and for the preservation of the property entrusted to their care. Much conflicting testimony has been given as to the time the tug, with the Eric in tow, arrived at Rankin's wharf; the length of time she remained there, and the exact time when she reached the bridge. Upon a review of the whole evidence I am of opinion that too great delay was made at the wharf, and that the time so lost was aggravated by the tug undertaking to tow two vessels together at that particular state of the tide; that by the time she reached the bridge the water had risen too high to allow the Eric to pass under, which I have no doubt she could have done had the tug proceeded with the Eric alone and reached the bridge half an hour or three-quarters of an hour earlier, which I have no doubt, under the evidence, could have been done. Under all the circumstances, I must hold the Maggie M. liable for the damage caused. The desire of the captain to tow both schooners together, and the delay occasioned by his long waiting at the wharf to suit the convenience of the master of the Gleaner, made him too late on the tide, and he then ran a risk which, I think, a prudent captain should not have done in the performance of so peculiar and perilous a service.

As to the damages to be allowed. It appears that the freight to be earned by the carrying of the cargo of ice has been lost, and after repairing, the Eric was obliged to accept a less remunerative charter. It is shown that the difference between the two charters amounts to \$100, which must be taken to be the loss sustained on freight; to this must be added \$193.98, being the sum paid for the repairs, making in the whole the amount of \$293.98, for which I give judgment for plaintiffs, with costs.

Decree accordingly.

By 3 & 4 Vict., c. 65, s. 6, the reference to locality, for services Court has jurisdiction, without in the nature of salvage or tow-

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age rendered to any ship or sea-going vessel. Under this Act the service rendered must have been to a "ship or sea-going vessel," and therefore a claim for salvage remuneration in respect of a raft of timber within the body of a county gave the Court of Admiralty no jurisdiction; *Raft of Timber*, 2 W. Rob. 251. Prior to this Act "in cases of towage, where there had been a contract between the parties, the Admiralty has no jurisdiction. It was, however, thought expedient by the legislature in all these matters to give a remedy to the parties who might have rendered these services, whether on the high seas, or within the body of a county, by assisting a vessel, within the proper jurisdiction of this Court, and not to leave them to an action at law, as before the passing of this Act;" *The Ocean*, 4 N. of Cas. 33; Edwards' Ad. 190. From early times the Court exercised jurisdiction over claims for towage services rendered on the high seas, and the 3 & 4 Vict., c. 65, sec. 6, extended that jurisdiction to the body of a county. The Vice-Admiralty Court Act, 1863, c. 24, sec. 10, in respect of towage, conferred a like jurisdiction on Vice-Admiralty Courts. Dr. Lushington, in *The Princess Alice*, 3 W. Rob. 140, defined an ordinary towage service as "the employment of one vessel

to expedite the voyage of another, where nothing more is required than the accelerating her progress." In *The Constancia*, 4 N. of Cas. 512; s. c. 10 Jur. 845, it was held that towage created a maritime lien; and that view was apparently unquestioned until in *The Heinrich Bjorn*, 10 P. D., p. 50, it was as an *obiter dictum* stated that towage gave no lien, but in the case of *Westrup v. Great Yarmouth Steam Carrying Co.*, 43 Ch. D. 241, the point came up squarely for determination, and it was held that ordinary towage services rendered to a ship created no maritime lien. As to the correlative duties of tug and tow, see *The Julia*, Lush. 224; *The Mary*, 5 P. D. 14. Where one ship is in tow of another, the two ships are, for some purposes, by intendment of law, regarded as one, the command or governing power being with the tow, and the motive power with the tug; *The Cleadon*, 14 Moo. P. C. 97, s. c. Lush. 158; *The America* and *The Syria*, L. R. 6 P. C. 127. The "tug is the servant of the tow," and those on board the tug must obey the orders of the tow; *The Christina*, 3 W. Rob. 27; s. c. 6 Moo. P. C. 371; *The Isca*, 12 P. D. 34; *The Niobe*, 13 P. D. 55; *Smith v. St. Lawrence Tow Boat Co.*, L. R. 5 P. C. 308. See also *Spaight v. Tedcastle*, 6 App. Cas. 217; *The Restless*, 13

Otto. 699. There is one exception, that tug and tow shall be deemed one ship, and the tow responsible for the conduct of the tug, and that is when the tug is rendering salvage service; *The Union Steamship Co. v. The Aracan*, L. R. 6 P. C. 127. In *The Quickestep*, 15 P. D. 196, it was held that a barge towed into collision by her tug was free from blame, on the ground that the governing power was solely in the tug. In the United States, it has been held that the owners of the tow may resort to either one of the offending vessels and recover for his whole loss; *The Atlas*, 93 U. S. 302; or recover his loss from both vessels; *The Alabama* and *The Gamecock*, 92 U. S. 695. In the latter case the decree is not *in solido* against both vessels for the damages, but a decree is made apportioning the loss between the two vessels. See Henry, Ad. 253. Where a tow suffers injury through improper and unseamanlike conduct on the part of the tug hauling it, the latter is liable for the damages; *The Burlington*, 137 U. S. 386. See Henry, Ad. 253; *The Atlas*, 93 U. S. 302. But recently in England the Court refused to amend a decree against a tug and the vessel in tow, which were jointly liable for collision, by inserting words to the effect that each vessel was primarily liable

for one-half only of the entire damages; *The Avon* and *The Thomas Joliffe* (1891), P. 7. Towage may be turned into salvage service under circumstances where the risk becomes so great as to be beyond the ordinary services of a tow-boat. Henry, Ad. 45; *The Connemara*, 108 U. S. 352; *The Rialto*, 15 Fed. Rep. 124; *The Galatia*, Swa. 349; *The Albion*, Lush. 282; *The I. C. Potter*, L. R. 3 A. & E. 292. For cases in which towage has not been converted into salvage, see *The Annapolis*, Lush. 355; *The Edward Hawkins*, Lush. 515; *The Robert Dixon*, 5 P. D. 54; *The Strathnaver*, 1 App. Cas. 58. A contract to tow is not a warranty to tow to destination, but to use best endeavour and competent skill for that purpose, with a vessel properly equipped; *The Minnehaha*, Lush. 335; *The William*, Cook 171; *Sewell v. British Columbia Towing Co.*, 9 Can. S. C. R. 527. The obligation to perform the service is terminated if rendered impossible by a *vis major*, *ibid.* The doctrine of common employment does not apply as between the tug and the servants and owners of the tow; *The Julia*, Lush. 224. For further statement of the law and citation of cases see *Marsden on Coll.* (3rd ed.) 185; *Newson on Salvage and Towage*, 134; *W. & Bruce* (ed. 1886) 175.

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June 6.

THE PARAMATTA.

Collision—Lookout—Fog-horn—Sailing Rules—Departure from—Liability.

Two vessels—the M. P. and the P.—came into collision in the Bay of Fundy, whereby the former was badly damaged. The wind at the time was blowing strong from south south-east. The M. P. was hove to on the port tack, under a reefed mainsail; and the P. was close hauled on the starboard tack. The weather at the time was foggy. The M. P. did not have a regulation fog-horn on board, but had a tin one blown by the mouth. When the P. was first seen by the M. P. she was from a quarter to a half mile distant. The M. P. was loaded with piling, bound for New York. The P. did not change her course, and ran into the M. P. and caused the injury.

Held:—That although the M. P. was on her port tack, she was practically hove to, and could execute no manœuvre to avoid the collision; that the absence of a regulation fog-horn on board did not occasion or contribute to the collision; but that the collision was occasioned by the want of a proper lookout on board the P., and she was therefore condemned in damages and costs.

This was a case of damage by collision instituted by the owners of the Mabel Purdy against the Paramatta. The collision took place in the Bay of Fundy on Tuesday, May 20, 1890, about 2 p. m. At the time the wind was blowing strong, and the weather was foggy. The facts and circumstances of the case are fully set out in the judgment of the Court. Mr. B. A. Stammers acted as nautical assessor.

L. A. Currey, for plaintiffs.

C. A. Palmer, for the Paramatta and owners.

The following judgment was now (June 6, 1891) delivered by

WATERS, J. This was a cause of collision instituted by the owners of the schooner Mabel Purdy against the bark Paramatta, of St. John, N. B., for a collision which took place in the Bay of Fundy about 2 o'clock on the afternoon of Tuesday, 20th May, 1890. The wind at the time of the collision was blowing strong from south south-west. The weather was foggy, occasionally lighting up. At the time

the Paramatta was first seen the schooner was hove to on the port tack under a reefed mainsail hauled on board and jib hauled to windward, her foresail and flying jib tied up, her head to the westward. The Paramatta was close hauled on the starboard tack, heading from south south-east to south-east, and running in the direction of the schooner. The ship was under what her captain called snug canvas, viz. : foresail, fore upper and fore lower topsails, mainsail hauled up, but with both topsails on her. On her mizzen the spanker was set. Her jib and staysail were set. The ship had a deckload higher than her rails. The schooner was bound from the head of the Bay to New York with a load of piling.

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Captain Scott, master of the ship, was the only witness examined belonging to the ship.

Captain Bishop and his three seamen, being the whole of his crew, were examined on behalf of the plaintiff. The speed of the ship was stated by Captain Scott to have been from three to four knots; by the master and crew of the schooner it was estimated at the rate of about five knots an hour.

The distance of the ship from the schooner when first seen is stated by Captain Bishop as from one-quarter to one-half mile. His mate, Robertson, says about one-half mile, and the other two of his crew state the distance to be about one-quarter of a mile.

Both vessels had tin mouth horns, which they state were blown regularly; but these horns do not appear to have been heard by the other vessel.

The reason given for the schooner being hove to was that there was too much wind for them to run down through the north channel. The evidence shows that the ship did not alter her course, but continued in the direction of the schooner, striking her on her starboard quarter and causing the damage complained of. The defences set up by the Paramatta are that :

1. There was not a proper lookout on the schooner.
2. That the schooner did not have a proper fog-horn properly going.

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3. That the schooner being on the port tack and seeing the Paramatta distant about half a mile, made no effort to avoid the collision.

4. That the schooner was short handed.

On the part of the schooner it is alleged :

1. That at the time the Paramatta was first seen the schooner was hove to on the port tack and was practically motionless, going slightly to leeward.

2. That no measures were taken by those in charge of the Paramatta to avoid the collision, and the schooner being hove to, was unable to get out of the way.

3. That the Paramatta was in fault in not having a proper lookout, in not sounding her fog-horn, and in not keeping out of the way of the schooner.

The case of the schooner is, that she was hove to and unable, for want of time and room, and from the state of the sea, to take any measure to prevent the accident, and that it therefore became the duty of those on board the ship to navigate her with care and skill, so as to avoid doing damage to the schooner.

Under all the evidence before me, which has been carefully considered in consulting with the nautical assessor who is advising the Court upon nautical questions, I am advised that considering the state of the wind and sea and the position of the schooner, if she was making any headway at all, she would be drifting in a north-westerly direction, and in the direction of the ship; also that the ship being as alleged, distant between one-quarter and half a mile from the schooner, and running in the direction of the schooner at a speed which he considered equal to a rate of about between four and five knots an hour, the schooner would not have had time in five minutes to swing off six points and clear the ship on the port side, as she would then be sailing for the ship, and the ship would at the same time be sailing direct for the schooner.

The assessor agrees with the evidence of Captain Gale that the ship would have got afoul of the schooner before

the schooner could have successfully executed any manœuvre, either to the eastward or to the westward, as suggested by defendants' counsel.

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That well established rule of the road was strongly pressed by defendants' counsel, viz: that the ship which is close hauled on the port tack shall keep out of the way of a ship which is close hauled on the starboard tack. Doubtless were the schooner sailing on her port tack with the wind free and with sufficient time and room to clear the ship, the argument might apply, but we must look at the actual condition of this schooner. She was practically hove to in a heavy sea, with her deck load of piling and with no headway upon her, and the eye of a seaman could have at once perceived that she was apparently helpless and incapable of performing any immediate manœuvre to get herself out of the way of the ship. From the appearance of the schooner there was nothing to indicate to those upon the ship that the schooner was about to attempt any change in her position. Cases do sometimes arise where two vessels are very close to each other, and where it is impossible to comply with the provisions of the regulations without danger being incurred. In such cases, in order to avoid immediate danger, other measures may be adopted. This is recognized by Article 23 of the regulations, which says: "In obeying and construing these rules due regard shall be had to all dangers of navigation and to any special circumstances which may render a departure from the above rules necessary to avoid immediate danger."

Thus in the case of *The Lady Ann* (1), cited by Mr. Palmer, *The Lady Ann* being the vessel on the starboard tack was condemned for not taking other measures to prevent a collision; it was held that she should have put her helm down and eased off the head sheets. The Court says: "These measures, by which we think the collision might have been avoided, she did not adopt, therefore *The Lady Ann* is to blame."

In order to avoid the danger in this case, I am advised that the bark being under command could easily have swung

(1) 15 Jur. 20.

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back, put on my coat, vest and pants, and returned to the deck, and was there two or three minutes before she struck us. I did not see any one on her deck. I looked to see. If they had kept the ship off a point or half a point she would have cleared us. I could see the ship when I first came on deck; she was about a quarter of a mile off."

James Robertson the other seaman of the schooner says: "It being my watch below I turned in and went to bed. About 2 o'clock the captain called me. I didn't hurry to get on deck quick. The captain called me again. I went on deck with only drawers and shirt on. I saw the bark was far enough off, and I went back and put on my clothes and got on deck a few minutes before she struck us. Before the ship struck us I could see no one on her deck. I could have seen it if any one had been on the lookout. If the lookout had been kept where it ought to have been, I would have seen it. Whilst on the deck of the ship after the collision I heard them say they did not see us until it was too late." This witness was asked in cross-interrogatory: "How far was the ship away from you when you first came up on deck in your shirt and drawers?" Answer: "I judge about half a mile. The fog was not dense; we could see about half a mile or more."

Under all this evidence it is impossible not to come to the conclusion that if there had been a proper lookout on board of the ship, she would have seen the schooner at quite a sufficient distance to have avoided the collision.

It was also strongly urged by defendants' counsel that inasmuch as the schooner was not provided with a proper fog-horn, as required by the regulations, she must be pronounced in fault, and not entitled to recover in this action, and the decision of the Admiralty given in the case of *The Love Bird* (1), has been cited for that purpose. I may remark here that R. S. Can. chap. 79, s. 5, differs materially from the section of the Imperial Act under which the case of *The Love Bird* was disposed of. I have, however, come to the conclusion under all the evidence and circumstances of this case that this collision was not occasioned or contributed

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 PARAMATTA. ship in not keeping a proper lookout and by continuing her course unaltered until danger to the schooner became inevitable. I am satisfied that had a proper lookout been kept the schooner could have been seen in ample time to have enabled the ship to adopt measures whereby she could easily have avoided the schooner altogether. For these reasons I must pronounce against the ship for damages and costs. I assess the damages at the sum of \$2,250.

Decree accordingly.

COLLISION.

For notes as to collision, see *ante*, pp. 24, 52, 78, 91, 98, 104, 114. For decisions allowing a departure from the regulations of navigation, see Marsden on Coll. (ed. 1891), p. 480 *et seq.*, and the cases there cited.

A collision occurred in the River Thames between two steamships, the *Petrel* and the *Cormorant*, belonging to the same owners, and the *Cormorant* sank, but there was no loss of life.

In an action brought by some of the owners of cargo on board the *Cormorant* against the *Petrel*, the latter vessel was found alone to blame. Thereupon the owners of the *Petrel* instituted proceedings for limiting their liability to £5,658 5s. on 707.28 tons, being £8 per ton on the gross tonnage of the *Petrel* without deduction of engine-room, but deducting 31.80 tons crew space under s. 9 of the Merchant Shipping Act, 1867, and in res-

pect of their claim for lost effects, making the master, officers, and crew of the *Cormorant* defendants with cargo owners and others.

On objection to the claim of the master, officers, and crew of the *Cormorant*, and to the deduction from the tonnage of the *Petrel* of the crew space,

Held, first, that the master, officers, and crew of the *Cormorant* were entitled to claim against the fund in respect of their lost effects, for, though they had a common employer with the master, officers and crew of the *Petrel*, in the sense that both crews were making money for him, they were not in common employment in the sense that injury from the negligence of one crew was an ordinary risk of the service of the other, for the safety of the crew of one of these two vessels did not depend on the skill and care of the crew of the other more than on the

skill and care of the crews of other vessels navigating the Thames; secondly, that as the requirements of s. 9 of the Merchant Shipping Act, 1867, had been complied with, the plaintiffs, as owners of the *Petrel*, in calculating the tonnage upon which their statutory liability was based, were entitled to deduct the 31.80 tons crew space; *The Petrel* (1893), P. 320.

LOOKOUT.

See *ante*, p. 104, for cases relating to lookout.

FOG-HORN.

See note *ante*, p. 114. It does not follow that a vessel is precluded from recovering for damage by collision because she had not a regulation fog-horn on board. The statute 36 & 37 Vict., c. 85, s. 17, imposes on a vessel that has infringed a regulation which is *prima facie* applicable to the case the burden

of proving not only that such infringement did not, but that it could not, by possibility, have contributed to the collision. As has already been pointed out, the Canadian Act, 43 Vict., c. 29, is similar to the Imperial Statute, 25 & 26 Vict., c. 63. The case of *The Joliette*, in the New Brunswick Admiralty District, was decided by Tuck, J., October 2nd, A. D. 1893. It was a case of collision in a fog in the Bay of Fundy between two vessels—the Emma G. and the Joliette—and on the trial it was proved that neither vessel had on board a mechanical fog-horn, as required by the regulations. There was no counterclaim, and the Emma G. alone was damaged. The learned judge found both vessels in fault for not having regulation fog-horns, and divided the damages, leaving each party to pay his own costs.

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February.

THE WHITE FAWN.

Fisheries Protection—Treaty of 1818—Preparing to Fish—What?

An American fishing vessel, the *W. F.*, in November, 1870, went into Head Harbor, a small bay on the eastern end of Campobello, in the Province of New Brunswick. While there the master purchased fresh herrings for bait for fishing purposes. The vessel was seized by the commander of a Dominion vessel engaged in the protection of the Canadian fisheries on the ground of violation of the Imperial Statute, 59 Geo. III., c. 38, and the Canadian Statutes, 31 Vict., c. 61, and 33 Vict., c. 15. An application was made by the Crown, on the part of the Attorney General of Canada, for a monition calling upon the owners of the vessel to show cause why she should not be condemned as forfeited to the Crown for violation of the above mentioned laws.

Held :— That the purchase of bait was not a “preparing to fish” illegally in British waters; that the intention of the master, so far as appeared, may have been to prosecute his fishing outside the three mile limit; and that the Court would not impute fraud or an intention to infringe the law in the absence of evidence. The monition for condemnation was therefore refused.

This was an application on the part of the Crown, represented by the Attorney General of Canada, for a monition to issue calling upon the owners of the American fishing vessel, *White Fawn*, to show cause why the said vessel should not be condemned as forfeited to the Crown for violation of the Imperial Statute 59 Geo. III, c. 38, and the Dominion Statutes 31 Vict., c. 61, and 33 Vict., c. 15. The facts of the case fully appear from the judgment of the Court.

W. H. Tuck, Q. C., appeared on behalf of the Crown, represented by the Attorney General of Canada.

The following is the judgment of the learned judge :

HAZEN, J. At the last sitting of this Court, Mr. Tuck, Q. C., proctor for the Crown, applied on behalf of Sir John A. Macdonald, the Attorney General of the Dominion, for a monition calling upon the owners of the schooner and her cargo to show cause why the *White Fawn*, and the articles

NOTE.—The judgment in this case was published in the *Daily Telegraph*, St. John, N. B., February 11, 1871.

above enumerated with her tackle, etc., should not be condemned as forfeited to the Crown for violation of the Imperial Statute, 59 Geo. III, chap. 38, and the Dominion Statutes, 31 Vic. chap. 61, and 33 Vic. cap. 15.

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The *White Fawn*, as it appears from her papers, was a new vessel of 64 tons, and registered at Gloucester, Massachusetts, in 1870, and owned in equal shares by Messrs. Somes, Friend and Smith, of that place; that she was duly licensed for one year to be employed in the coasting trade and fisheries, under the laws of the United States; that by her "Fishery Shipping Paper," signed by the master and ten men, the usual agreement was entered into for pursuing the cod and other fisheries, with minute provisions for the division of the profits among the owners, skipper and crew. These papers and other documents found on board are all in proper order, and not the slightest suspicion can be thrown upon them. The seamen's articles are dated 19th November, 1870. On the 24th November, 1870, she arrived at Head Harbor, a small bay in the eastern end of Campobello, in the County of Charlotte, in this Province.

Captain Betts, a fishery officer, in command of the *Water Lily*, a vessel in the service of the Dominion, states that on the 25th November he was lying with his vessel in Head Harbor. Several other vessels, and among them the *White Fawn*, were lying in the harbor; that he went on board the *White Fawn*; he states a number of particulars respecting the vessel from her papers, and adds that the said vessel, *White Fawn*, had arrived at Head Harbor on the 24th November, and had been engaged purchasing fresh herrings, to be used as bait in trawl fishing; that there were on board about five thousand herrings, which had been obtained and taken on board at Head Harbor; also, fifteen tons of ice, and all materials and appliances for trawl fishing, and that the master admitted to him that the herring had been obtained at Head Harbor by him for the purpose of being used as bait for fishing. There are, then, some remarks as to the master being deceived as to the fact of the cutter being in the neighborhood, which are not material; and that deponent further understood that persons had been

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employed at Head Harbor to catch the herring for him; that he seized the schooner on the 25th November, and arrived with her the same evening at St. John, and delivered her on the next day to the Collector of Customs. No reason is given for the delay which has taken place of more than two months in proceeding against the vessel, which was seized, as alleged by Captain Betts, for a violation of the terms of the convention and laws of Canada; her voyage was broken up and her crew dispersed at the time of the seizure.

By the Imperial Statute of 59 George III, cap. 38, it is declared that if any foreign vessel, or person on board thereof, "shall be found fishing, or to have been fishing, or preparing to fish, within such distance (three marine miles) of the coast, such vessel and cargo shall be forfeited." The Dominion Statute 31 Vic., cap. 61, as amended by 33 Vic., cap. 15, enacts: "If such foreign vessel is found fishing, or preparing to fish, or to have been fishing in British waters, within three marine miles of the coast, such vessel, her tackle, etc., and cargo, shall be forfeited."

The *White Fawn* was a foreign vessel in British waters; in fact, within one of the counties of the province, when she was seized. It is not alleged that she is subject to forfeiture for having entered Head Harbor for other purposes than shelter and obtaining wood and water. Under section 3 of the Imperial Act no forfeiture, but a penalty, can be inflicted for such entry. Nor is it alleged that she committed any infraction of the customs or revenue laws. It is not stated that she had fished within the prescribed limits, or had been found fishing, but that she was "preparing to fish," having bought bait (an article no doubt very material, if not necessary, for successful fishing) from the inhabitants of Campobello. Assuming that the facts of such purchase establishes a "preparing to fish" under the statutes (which I do not admit), I think, before a forfeiture could be incurred, it must be shown that the preparations were for an illegal fishing in British waters; hence, for aught which appears, the intention of the master may have been to prosecute his fishing outside of the three mile limit, in conformity with

the statute ; and it is not for the Court to impute fraud or an intention to infringe the provisions of our statutes to any person, British or foreign, in the absence of evidence of such fraud. He had a right, in common with all other persons, to pass with his vessel through the three miles, from our coast to the fishing grounds outside, which he might lawfully use, and, as I have already stated, there is no evidence of any intention to fish before he reached such grounds.

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The construction sought to be put upon the statutes by the Crown officers would appear to be thus : "A foreign vessel, being in British waters, and purchasing from a British subject any article which may be used in prosecuting the fisheries without its being shown that such article is to be used in illegal fishing in British waters, is liable to forfeiture as preparing to fish in British waters."

I cannot adopt such a construction ; I think it harsh and unreasonable, and not warranted by the words of the statute. It would subject a foreign vessel, which might be of great value, as in the present case, to forfeiture, with her cargo and outfits, for purchasing (while she was pursuing her voyage in British waters, as she lawfully might do, within three miles of our coast) of a British subject any article, however small in value (cod line or net, for instance), without its being shown that there was any intention of using such articles in illegal fishing in British waters before she reached the fishing ground to which she might legally resort for fishing under the terms of the statute.

I construe the statute simply thus : If a foreign vessel is found, 1st, having taken fish ; 2nd, fishing, although no fish have been taken ; 3rd, "preparing to fish," *i. e.*, with her crew arranging her nets, lines, and fishing tackle for fishing, though not actually applied to fishing in British waters. In either of these cases specified in the statute the forfeiture attaches.

I think the words "preparing to fish" were introduced for the purpose of preventing the escape of a foreign vessel which, though with intent of illegal fishing in British waters, had not taken fish or engaged in fishing by setting nets and

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Taking this view of the statute, I am of the opinion that the facts disclosed by the affidavits do not furnish legal grounds for the seizure of the American schooner *White Fawn* by Captain Betts, the commander of the Dominion vessel *Water Lily*, and do not make out a *prima facie* case for condemnation in this Court of the schooner, her tackle, etc., and cargo.

I may add that, as the construction I have put upon the statute differs from that adopted by the Crown officers of the Dominion, it is satisfactory to know that the judgment of the Supreme Court may be obtained by information filed there, as the Imperial Act 59 Geo. III, cap. 38, gave concurrent jurisdiction to that Court in cases of this nature.

Monition refused.

The following is clause 1 of the Convention of 1818:

"ART. 1.—*Whereas*, differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties that the inhabitants of the said United States shall have, forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern

coast of Newfoundland; from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands; and also on the coasts, bays, harbors, and creeks, from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belleisle; and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company; and that the American fishermen shall also have liberty, forever, to dry and cure fish in any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the

same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground.

"And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbors of His Britannic Majesty's dominions in America not included within the above mentioned limits, provided, however, that the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever.

"But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

The Imperial Statute 59 Geo. III, c. 38, was passed to enable the authorities to enforce the stipulations of the treaty of 1818. By section 1 His Majesty in Council was authorized to make all necessary regulations, and sections 2 and 3 are as follows:

"2. And be it further enacted, That from and after the passing of this Act, it shall not be lawful for any person or persons, not being a natural born subject of His Majesty, in any foreign ship, vessel or boat, nor for any person in any ship, vessel or boat, other than shall be navigated according to the laws of the United Kingdom of Great Britain and Ireland, to fish for, or to take, dry, or cure any fish of any kind whatever, within three marine miles of any coasts, bays, creeks or harbors whatever, in any part of His Majesty's dominions in America not included within the limits specified and described in the first article of the said Convention, and hereinbefore recited; and that if any such foreign ship, vessel or boat, or any persons on board thereof, shall be found fishing, or to have been fishing, or preparing to fish, within such distance of such coasts, bays, creeks or harbors, within such parts of His Majesty's dominions in America, out of the said limits, as aforesaid, all such ships, vessels and boats, together with their cargoes, and all guns, ammunition, tackle, apparel, furniture and stores, shall be forfeited, and shall and may be seized, taken, sued for, prosecuted, recovered and condemned by such and the like ways, means and methods, and in the same Courts as ships, vessels or boats may be forfeited,

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seized, prosecuted and condemned for any offence against any laws relating to the Revenue of Customs, or the laws of Trade and Navigation, under any Act or Acts of the Parliament of Great Britain or of the United Kingdom of Great Britain and Ireland; Provided that nothing in this Act contained shall apply, or be construed to apply, to the ships or subjects of any Prince, Power or State in amity with His Majesty, who are entitled by treaty with His Majesty to any privilege of taking, drying, or curing fish on the coasts, bays, creeks or harbors, or within the limits in this Act described.

"3. Provided always, and be it enacted, That it shall and may be lawful for any fisherman of the said United States to enter into any such bays or harbors of His Britannic Majesty's dominions in America as are last mentioned, for the purpose of shelter and repairing damages therein, and of purchasing wood and of obtaining water, and for no other purpose whatever; subject, nevertheless, to such restrictions as may be necessary to prevent such fishermen of the said United States from taking, drying or curing fish in the said bays or harbors, or in any other manner whatever abusing the said privileges by the said treaty and this Act reserved to them, and as shall for that purpose be imposed

by any Order or Orders to be from time to time made by His Majesty in Council under the authority of this Act, and by any regulations which shall be issued by the Governor, or person exercising the office of Governor in any such parts of His Majesty's dominions in America, under or in pursuance of any such Order in Council as aforesaid."

The Canadian Parliament in 1868 (31 Vic. c. 61) passed a law to prevent illegal fishing on the part of foreign fishermen, and in 1870 (33 Vic. c. 15) amended section 3 of the first named Act so as to read as follows:

"3. Any one of such officers or persons as are above mentioned may bring any ship, vessel or boat, being within any harbor in Canada, or hovering (in British waters) within three marine miles of any of the coasts, bays, creeks or harbors in Canada, into port, and search her cargo, and may also examine the master upon oath touching the cargo and voyage; and if the master, or person in command, shall not truly answer the questions put to him in such examination, he shall forfeit four hundred dollars; and if such ship, vessel or boat be foreign, or not navigated according to the laws of the United Kingdom, or of Canada, and have been found fishing, or preparing

to fish, or to have been fishing (in British waters) within three marine miles of any of the coasts, bays, creeks or harbors of Canada, not included within the above mentioned limits, without a license, or after the expiration of the period named in the last license granted to such ship, vessel or boat under the first section of this Act, such ship, vessel or boat, and the tackle, rigging, apparel, furniture, stores, and cargo thereof shall be forfeited."

And by sec. 7 of 31 Vic. c. 61, any penalty or forfeiture under the Act might be prosecuted and recovered in any Court of Vice-Admiralty within Canada. The jurisdiction formerly exercised by the Vice-Admiralty Courts is now vested in the Exchequer Court under the terms of "*The Admiralty Act*, 1891.

In the case of *The J. H. Nickerson*, Young's Ad. Dec. 96,

Nov. 14, 1871, Sir William Young, C. J., sitting in Admiralty, decided contrary to the judgment of Hazen, J. In this case *The J. H. Nickerson* entered the Bay of Ingouish, in Cape Breton, for the alleged purpose of obtaining water, etc.; but the evidence clearly showed that the real object of her entry was to obtain bait, and that a quantity of bait was so procured. She was seized by the government cutter, after she had been warned off, and while she was still at anchor within three marine miles of the shore. Held, that she was guilty of procuring bait and preparing to fish within the prescribed limit, and must therefore be forfeited. See these cases cited and commented on in 3 Wharton's International Law Digest, sec. 304, p. 52. *The White Fawn* is also cited at large in 3 Halifax Com. 3,382.

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In re DAVID COLLINS, et al., held on Charge of Piracy for Extradition.

The importance and peculiar circumstances of this case justify its insertion in this volume, although not an Admiralty case. It was published in pamphlet form in 1864 by Messrs. J. & A. McMillan, St. John, N. B., shortly after Mr. Justice Ritchie's decision. It is now difficult to procure a copy of this pamphlet. This was the first case which had at that time arisen in New Brunswick under the Treaty of Extradition of 1842, between Her Majesty and the United States of America, and the Imperial Act 6 & 7 Vict., c. 76, for giving effect thereto. The publishers at the time, in the preparation of the case, availed themselves of the services of Charles W. Weldon, Esq., one of the counsel engaged in the cause, and of William M. Jarvis, Esq., at that time reporter to the Law Society of decisions at Chambers. It may therefore be relied on as an accurate report of all the proceedings.

Shortly after the retaking of the *Chesapeake* in Sambro, Nova Scotia, some of the original captors having returned to this Province, the United States Consul in St. John addressed to the Hon. S. L. Tilley, the Provincial Secretary, two letters under date 22nd December, 1863 (1). Accompanying

(1) REQUISITIONS OF THE UNITED STATES CONSUL.

*St. John, N. B., Dec. 22nd, 1863.*HON. S. L. TILLEY, *Provincial Secretary.*

SIR:—I beg leave to transmit the depositions of the captain and second mate of the Steamer *Chesapeake*, to be presented to His Excellency, in case he requires evidence of the criminality of the persons charged with the crime of Piracy, before issuing the warrant for having them brought to trial. It is to be sincerely hoped that no obstacles will be thrown in the way of bringing those charged with so grave an offence to justice.

We had believed until this late hour that a requisition before the Executive would not have been required in the first instance.

Yours truly,

(Signed.)

J. Q. HOWARD, *U. S. Consul.*

UNITED STATES CONSULATE.

*St. John, New Brunswick, December 22, 1863.*HON. S. L. TILLEY, *Provincial Secretary.*

SIR:—I have the honor to address, through you, a communication to the Lieutenant Governor of the Province, for the purpose of requesting that His

these letters was an affidavit jointly made by Isaac Willett, captain, and Daniel Henderson, second mate of the steamer, detailing the facts within their knowledge concerning the capture of the steamer, the said affidavit having been sworn to before H. T. Gilbert, Esq., Police Magistrate and a Justice of the Peace for the City and County of Saint John, on the 22nd day of December, A. D. 1863. On these papers His Excellency the Lieutenant Governor issued a warrant (2)

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Excellency will be pleased to use the authority vested in him by the Act of Parliament for giving effect to what is known as the "Ashburton Treaty" to the end that certain offenders may be apprehended and delivered up to Justice.

You will please make known to His Excellency, that as an officer of the Government of the United States, I am authorized by the Executive Department of the Government to make a requisition upon him, as the officer administering the Government of the Province, in order that certain persons believed to be guilty of the crime of Piracy may be brought before the proper officers of Justice, so that the evidence of their guilt or innocence may be heard and considered. I have, therefore, the honor to request, that in accordance with the provisions of the said Act of Parliament, His Excellency will by warrant signify that a requisition has been made for the apprehension of John C. Braine, H. C. Brooks, David Collins, John Parker Locke, Robert Clifford, Linus Seely, George Robinson, Gilbert Cox, Robert Cox, H. A. Parr, and James McKinney, and require that all Justices of the Peace and other Magistrates, within the jurisdiction of this Province, shall aid in apprehending the above named persons, accused of the crime of Piracy, for the purpose of having them brought to trial.

I am sir,

Your obt. Servant,

(Signed) J. Q. HOWARD, *U. S. Consul.*

[L. S.]

I HEREBY CERTIFY that the foregoing are true copies of the original letters and requisition of J. Q. Howard, Esq., United States Consul, at the City of Saint John, and are now on file in my office.

(Signed) S. L. TILLEY, *Prov. Secretary.*

Secretary's Office, 29th January, 1864.

- (2) Extract from the Treaty between Her Majesty and the United States of America, signed at Washington, August 9th, 1842; commonly known as the "Ashburton Treaty."

"ARTICLE X.

"It is agreed that Her Britannick Majesty and the United States shall, upon mutual requisitions by them or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within

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THE under the provisions of the Act of Parliament 6 & 7 Vic.,
cap. 76 (3).

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the territories of the other:— provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed; and the respective Judges and other Magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such Judges or other Magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining Judge or Magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive.”

(3)

“ 6 & 7 VIC., CAP. LXXVI.

“ An Act for giving effect to a treaty between Her Majesty and the United States of America for the apprehension of certain offenders.

“Whereas by the tenth article of a treaty between Her Majesty and the United States of America, signed at Washington on the ninth day of August in the year one thousand eight hundred and forty-two, the ratifications whereof were exchanged in London on the thirteenth day of October in the same year, it was agreed that Her Majesty and the said United States should, upon mutual requisitions by them or their ministers, officers, or authorities respectively made, deliver up to justice all persons who being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either of the high contracting parties, should seek an asylum or should be found within the territories of the other; provided that this should only be done upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged should be found would justify his apprehension and commitment for trial if the crime or offence had been there committed, and that the respective Judges and other Magistrates of the two Governments, should have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, so that he might be brought before such Judges or other Magistrates respectively, to the end that the evidence of criminality might be heard and considered, and if on such hearing the evidence should be deemed sufficient to sustain the charge, it should be the duty of the examining Judge or Magistrate to certify the same to the proper executive authority, that a warrant might issue for the surrender of such fugitive, and that the expense of such apprehension and delivery should be borne and defrayed by the party making the requisition and receiving the fugitive; and it is by the eleventh article of the said treaty further agreed, that the tenth article here-

Mr. Gilbert, on receiving His Excellency's warrant, took

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inbefore recited, should continue in force until one or other of the high contracting parties should signify its wish to determine it and no longer: And whereas it is expedient that provision should be made for carrying the said agreement into effect, be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same. That in case requisition shall at any time be made by the authority of the said United States, in pursuance of and according to the said treaty, for the delivery of any person charged with the crime of murder, or assault with intent to commit murder, or with the crime of piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of the United States of America, who shall be found within the territories of Her Majesty, it shall be lawful for one of Her Majesty's principal Secretaries of State, or in Ireland for the Chief Secretary of the Lord Lieutenant of Ireland, and in any of Her Majesty's colonies or possessions abroad for the officer administering the Government of any such colony or possession, by warrant under his hand and seal to signify that such requisition has been so made, and to require all Justices of the Peace and other Magistrates and Officers of Justice within their several jurisdictions to govern themselves accordingly, and to aid in apprehending the person so accused, and committing such person to gaol, for the purpose of being delivered up to justice, according to the provisions of the said treaty; and thereupon it shall be lawful for any Justice of the Peace, or other person having power to commit for trial persons accused of crimes against the laws of that part of Her Majesty's Dominions in which such supposed offender shall be found, to examine upon oath any person or persons touching the truth of such charge, and upon such evidence as according to the laws of that part of Her Majesty's Dominions would justify the apprehension and committal for trial of the person so accused if the crime of which he or she shall be so accused had been there committed it shall be lawful for such Justice of the Peace, or other person having power to commit as aforesaid, to issue his warrant for the apprehension of such person, and also to commit the person so accused to gaol, there to remain until delivered pursuant to such requisition as aforesaid.

"II. Provided always, and be it enacted, That in every such case, copies of the depositions upon which the original warrant was granted, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended."

[The remaining sections of the Act are not material to the decision in this case.]

WARRANT ISSUED BY THE LIEUTENANT GOVERNOR UNDER THE TREATY
AND STATUTE.

NEW BRUNSWICK.

By His Excellency the Honorable ARTHUR HAMILTON GORDON,
[SEAL.] C. M. G., Lieutenant Governor and Commander-in-
Chief of the Province of New Brunswick, &c., &c.

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Whereas in and by an Act of Parliament made and passed in the sixth and seventh years of the reign of Her Majesty Queen Victoria, entitled "An Act for giving effect to a treaty between Her Majesty and the United States of America for the apprehension of certain offenders," it is among other things enacted "that in case requisition shall at any time be made by the authority of the said United States, in pursuance of and according to the said treaty for the delivery of any person charged with the crime of murder, or assault with intent to commit murder, or with the crime of piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of the United States of America, who shall be found within the territories of Her Majesty, it shall be lawful for one of Her Majesty's principal Secretaries of State, or in Ireland, for the Chief Secretary of the Lord Lieutenant of Ireland, and in any of Her Majesty's colonies or possessions abroad, for the officer administering the Government of any such colony or possession by warrant under his hand and seal to signify that such requisition has been made, and to require all Justices of the Peace and other Magistrates and officers of Justice within their several jurisdictions to govern themselves accordingly and to aid in apprehending the person so accused and committing such person to gaol for the purpose of being delivered up to justice according to the provisions of the said treaty, and thereupon it shall be lawful for any Justice of the Peace or other person having power to commit for trial persons accused of crimes against the laws of that part of Her Majesty's dominions in which such supposed offender shall be found, to examine upon oath any person or persons touching the truth of such charge and upon such evidence as according to the laws of that part of Her Majesty's dominions would justify the apprehension and committal for trial of the person so accused of the crime of which he or she shall be so accused, had been there committed, it shall be lawful for such Justice of the Peace or other person having power to commit as aforesaid, to issue his warrant for the apprehension of such person, and also to commit the person so accused to gaol there to remain until delivered pursuant to such requisition as aforesaid.

And whereas, in pursuance of and in accordance with the said treaty and act a requisition has been made to me, on behalf of the said United States, by J. Q. Howard, Consul of the said United States at the City of Saint John, in this Province, stating that John C. Braine, H. C. Brooks, David Collins, John Parker Locke, Robert Clifford, Linus Seely, George Robinson, Gilbert Cox, Robert Cox, H. A. Parr, and James McKinney, charged upon the oath of Isaac Willett and Daniel Henderson with having committed the crimes of piracy and murder on the high seas, within the jurisdiction of the said United States of America, on the seventh day of December instant, are, or some of them are now in the City of Saint John, within this Province, and requesting that the said John C. Braine, H. C. Brooks, David Collins, John Parker Locke, Robert Clifford, Linus Seely, George Robinson, Gilbert Cox, Robert Cox, H. A. Parr, and James McKinney, may be delivered up to justice according to the provisions of the said treaty. Now know ye, that pursuant to

the complaint (4) of Captain Isaac Willett, and on the 25th

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this power in me vested in and by the said Act of Parliament, I do hereby, by this warrant under my hand and seal, signify that such requisition has been so made, and hereby require and command all Justices of the Peace and other Magistrates and other officers of Justice of this Province, within their several jurisdictions, to govern themselves accordingly and to aid in apprehending the said John C. Braine, H. C. Brooks, David Collins, John Parker Locke, Robert Clifford, Linus Seely, George Robinson, Gilbert Cox, Robert Cox, H. A. Parr, and James McKinney, so accused, and committing them, the said John C. Braine, H. C. Brooks, David Collins, John Parker Locke, Robert Clifford, Linus Seely, George Robinson, Gilbert Cox, Robert Cox, H. A. Parr, and James McKinney, to gaol for the purpose of being delivered up to justice according to the provisions of the said treaty. And hereof they will not fail at their peril.

Given under my hand and seal at Fredericton, in the Province of New Brunswick, this twenty-fourth day of December, in the twenty-seventh year of Her Majesty's Reign, Anno Domini, 1863.

By His Excellency's Command,

(Signed.)

S. L. TILLEY.

(4) COMPLAINT OF CAPTAIN WILLETT, TAKEN BY THE POLICE MAGISTRATE OF SAINT JOHN.

DECEMBER 25, 1863.

City and County of St. John, to wit:

The complaint of Isaac Willett, of the State of New York, in the United States of America, master mariner, now in the City of Saint John, aforesaid, taken and sworn to this twenty-fifth day of December, in the year of our Lord one thousand eight hundred and sixty-three, at the city aforesaid, before me, Humphrey T. Gilbert, Esq., Police Magistrate for the City of Saint John, and one of Her Majesty's Justices of the Peace for the City and County of Saint John, acting under a warrant under the hand and seal of His Excellency the Honorable Arthur H. Gordon, Lieutenant Governor and Commander-in-Chief of the Province of New Brunswick, bearing date the twenty-fourth day of December, one thousand eight hundred and sixty-three, and made and issued in pursuance of the Act of the Imperial Parliament, entitled an Act for giving effect to a treaty between Her Majesty and the United States of America for the apprehension of certain offenders, such warrant directed to all and every the Justices of the Peace and officers of justice within the Province of New Brunswick.

The said Isaac Willett, being duly sworn, saith as follows: That he, this deponent, on the seventh day of December, one thousand eight hundred and sixty-three, was master in charge and command of the American passenger steamboat or vessel *Chesapeake*, and owned by Henry B. Cromwell, of the State of New York, in the United States of America, merchant. That the said steamboat or vessel is duly registered in pursuance of the United States laws for the registering of ships or vessels, and was so registered on the seventh

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day of December instant. That the said steamboat or vessel was of the value of the sum of sixty thousand dollars and upwards of current money of New Brunswick, and had on board a valuable cargo of the value of eighty thousand dollars and upwards of like current money, and there were at the time a number of passengers on board the said ship or vessel. That the said vessel or steamboat left the port of New York on the fifth day of December instant, being then duly registered as aforesaid, with the cargo of the value aforesaid on board, and a number of passengers, on a voyage from the said port of New York to the port of Portland, in the United States, this deponent being in command of the said steamboat or vessel. That John C. Braine, H. C. Brooks, David Collins, Robert Clifford, Linus Seely, George Robinson, Gilbert Cox, Robert Cox, H. A. Parr, and James McKinney, having taken passage on board of the said steamboat or vessel, left the said port of New York in and on board the said steamboat or vessel, as passengers on the said voyage. That the said steamboat or vessel proceeded on her said voyage, and while on the said voyage, this deponent being in command of said steamboat or vessel, the said vessel then being on the high seas about twenty miles north north-east of Cape Cod, in the United States of America, on the seventh day of December instant, certain passengers on board the said vessel, namely, the said John C. Braine, H. C. Brooks, David Collins, Robert Clifford, Linus Seely, George Robinson, Gilbert Cox, Robert Cox, H. A. Parr, and James McKinney, so being passengers on board the said steamboat or vessel, with force and arms, on the high seas, in and on board the said steamboat or vessel called the *Chesapeake*, in a certain place upon the high seas, distant about twenty miles from Cape Cod, aforesaid, then being, in and upon this deponent, and upon others the mariners then navigating the said vessel upon the said voyage, maliciously, wilfully, feloniously, and piratically, did make an assault, and this deponent and others, the said mariners, then and there piratically, feloniously, wilfully, and maliciously, did put in bodily fear and danger of their lives, on the high seas aforesaid, and then and there maliciously, wilfully, feloniously and piratically took possession of the said steamboat or vessel and the cargo thereof; the said steamboat or vessel being under the charge and command of this deponent, and there and then, with force and arms, took the said steamboat or vessel, and cargo of said vessel, from the care and custody of this deponent and the said mariners, against the will of this deponent and the said mariners, and then and there, with force and arms, upon the high seas aforesaid, in the place aforesaid, and within the jurisdiction of the United States of America, piratically, wilfully, maliciously, and feloniously and violently did steal, take and carry away the said vessel and cargo, and the said named persons did then and there, with a pistol loaded with powder and leaden bullets, shoot at, and feloniously, maliciously, wilfully and piratically kill and murder one Orin Schaffer, the second engineer, he being then a hand employed in and on board the said steamboat or vessel, on the voyage aforesaid; and the said named persons, having so taken possession of the said steamboat or vessel, put this deponent and others, the crew of said vessel, from the steamboat or vessel into and on board a pilot boat, and the said named persons also then and there wilfully, feloniously, maliciously and piratically, with a pistol loaded with powder and leaden bullets, shot at and wounded in the right knee and left arm one Charles Johnston, he, the said Charles Johnston, then and there

day of December issued his warrant (5) to apprehend cer-

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being chief mate of the said steamboat or vessel, and also then and there, with a pistol loaded with powder and leaden bullets, wilfully, feloniously, maliciously and piratically shot at and wounded in the chin one James Johnson, he, the said James Johnson, then and there being chief engineer in and on board the said vessel; and this deponent further saith that the said named persons, having so taken possession of the said steamboat or vessel, they, the said named persons, proceeded from the said place where the said offences were committed, to and up the Bay of Fundy, and that having proceeded to a place on the high seas about fifteen miles below Dipper Harbor, in the Province of New Brunswick, one John Parker Locke came to the said steamboat or vessel and boarded her, and immediately took charge and command of the said steamboat or vessel and cargo, against the will of deponent and others, the mariners of the said ship or vessel. That until the said John Parker Locke came on board of the said vessel, the said John C. Braine appeared to have command of the persons who so piratically took possession of the said ship or vessel as aforesaid, and this deponent further saith that he verily believes the said John C. Braine is now in the City of Saint John, in the Province of New Brunswick.

(Signed)

ISAAC WILLETT.

Sworn at the City of Saint John, in the City and County of Saint John, this 25th day of December, A. D., 1863, before me.

(Signed)

H. T. GILBERT, P. M. and J. P.

(5) WARRANT FOR THE APPREHENSION OF THE PRISONERS, ISSUED BY THE POLICE MAGISTRATE.

To any Constable or Peace Officer of the City, or City and County of Saint John:

Apprehend John C. Braine, H. C. Brooks, David Collins, Robert Clifford, Linus Seely, George Robinson, Gilbert Cox, Robert Cox, H. A. Parr, and James McKinney, and bring them before me, or some other Justice at the Police Office, in the City of Saint John, to answer the complaint of Isaac Willett, of the State of New York, in the United States of America, master mariner, made on oath, for having on the seventh day of December, in the year of our Lord one thousand eight hundred and sixty-three, on the high seas, about twenty miles north north-east of Cape Cod, in the United States of America, on the seventh day of December aforesaid, with force and arms, maliciously, wilfully, feloniously and piratically made an assault upon the said Isaac Willett and others, the mariners then on board, and in charge and command of the steamboat or vessel named the *Chesapeake*, the said vessel being a vessel belonging to one Henry B. Cromwell, a citizen of the United States of America, and being of the value of sixty thousand dollars of lawful money of New Brunswick, and having on board a cargo of the value of eighty thousand dollars of like lawful money, and the said vessel being then on a voyage from the port of New York, in the United States of America, to the port of Portland, in the United States of America, and having then and there piratically, feloniously, wilfully and maliciously put the said Isaac Willett and others, the crew of the said vessel, in fear and danger of their lives on the

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tain persons therein named, upon which warrant David Collins, James McKinney, and Linus Seely, parties named therein, were arrested and brought before Mr. Gilbert for examination on January 4th, 1864.

Andrew R. Wetmore, Q. C., and *William H. Tuck*, appeared for the prosecution on behalf of the Federal authorities.

Hon. John H. Gray, Q. C., and *Charles W. Weldon*, appeared for the prisoners on behalf of the Confederate States.

PRELIMINARY EXAMINATION.

Before the examination commenced, Mr. Gray asked Mr. Wetmore to elect upon which charge he would now proceed, and to state in whose name he was proceeding. Mr. Wetmore replied that he would only state that he was proceeding upon the complaint of Isaac Willett. He first stated that he would take up the charge of murder, and subsequently decided to proceed with that of piracy, in the first instance. Mr. Gray then objected :

high seas aforesaid, and having then and there maliciously, wilfully, feloniously and piratically taken possession of the said vessel and the cargo thereof, and with having then and there feloniously, wilfully, maliciously and piratically stolen and taken the said vessel and cargo upon the high seas aforesaid, and also for having at the time and place aforesaid, feloniously, wilfully, maliciously and piratically, upon the high seas aforesaid, killed and murdered one Orin Schaffer, in and on board the said vessel on the said voyage, and also for having at the time and place aforesaid, with force and arms, feloniously, wilfully, maliciously and piratically assaulted and wounded one Charles Johnston, and also for having at the time and place aforesaid, feloniously, wilfully maliciously and piratically assaulted and wounded one James Johnson, and to be dealt with according to law. The said complaint having been made and taken, and this warrant having been issued in pursuance of a warrant under the hand and seal of His Excellency the Honorable Arthur H. Gordon, Lieutenant Governor, and Commander-in-Chief of the Province of New Brunswick, bearing date the twenty-fourth day of December, one thousand eight hundred and sixty-three, and made and issued in pursuance of the Act of the Imperial Parliament, entitled an Act for giving effect to a treaty between Her Majesty and the United States of America, for the apprehension of certain offenders.

Dated this 25th day of December, in the year of our Lord one thousand eight hundred and sixty-three, and given under my hand and seal on the said date.

(Signed)

H. T. GILBERT,

[L. S.]

Pol. Mag. & Jus. of the Peace.

1. That this Court has no power or jurisdiction to try for the offence of piracy; that for the trial of piracy a special commission must issue and a Court be specially constituted for the purpose; and that such Court is distinctly provided for by the Imperial Act.

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2. That the warrant was insufficient. It does not show upon the face facts which are essential, under the treaty with the United States, to bring this matter into the Courts of this Province, or to create the special jurisdiction, which enables us to arrest parties under those charges. [Mr. Gray cited the case of *Dillan*, charged with an offence on the sea beyond Provincial jurisdiction, who was arraigned before Judge Parker at the last circuit, and discharged. And Mr. Weldon cited the case of the brig *Eliza*, in 1847.]

3. Not only is the warrant insufficient on these grounds, but on the face of it is bad, as charging two distinct offences triable before two different tribunals. There ought to be two warrants.

Mr. Gray thought these objections fatal to any proceedings. Mr. Wetmore replied at some length, and read a large portion of the Imperial Act passed to give effect to the Extradition Treaty. He claimed that everything so far was regular, and that the magistrate could not go back of the warrant, which was sufficient authority for him. The magistrate told Mr. Gray that there was probably something in his argument, but that at present he would proceed with the preliminary examination, and if he decided before the case was through that he had no jurisdiction, he would give the prisoners the benefit of it.

The following witnesses were then examined:

EVIDENCE OF CAPTAIN WILLETT.

Captain Isaac Willett, sworn: Am a citizen of the United States; live in Brooklyn; a seaman for thirty years; know the *Chesapeake*, owned by H. B. Cromwell, also a citizen of the United States; was master of her in December, and had been for seventeen months; she was rebuilt in New York about three years ago; previous to that she was called the *Totten*. [Mr. Wetmore asked where she was registered?

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Both Messrs. Gray and Weldon objected to the question as improper. The magistrate agreed with them.] During the seventeen months the vessel plied between New York and Portland; she had a coasting license. [Mr. Gray objected to any evidence respecting contents of this license; objection sustained.] He had the paper until it was taken away from him on board the ship. On the 4th and 5th December I had charge of the *Chesapeake*, then lying in North River taking in cargo for Portland. Most of the freight was taken in on the 5th, Saturday. She carried passengers also. I saw these three prisoners on board on the trip in question. Saw them first about supper-time, about six o'clock in the evening. We left New York on the 5th December; I was in the wheel-house when the vessel left the wharf. They did not buy tickets; paid their money on board. I identify Collins and recognize the others. I wrote their names on a piece of paper and gave it to the stewardess to arrange rooms for them. [Mr. Wetmore asked the names of the other persons on board. Mr. Gray objected; objection overruled.] There was a person who called himself John C. Braine; said he was colonel. Understood there was a person named Brooks; don't recollect the names of Seely and Clifford. All the passengers paid their passage except two. We proceed direct to Portland from New York; do not call. The vessel, a propeller, was worth \$60,000 to \$70,000. There was an assorted cargo — flour, sugar, wine, and such like. Do not recollect the owners; do not know its value, probably \$80,000 to \$100,000. There was no disturbance until Monday morning, 7th. We were then about twenty miles N. N. E. of Cape Cod; Cape Cod is in the United States. About a quarter past one in the morning, the first thing I knew the chief mate, Charles Johnston, came to my room and called me, saying somebody had shot the second engineer, Orin Shaffer. I turned out of my room and went to see how badly he was shot, and had hardly time to get out of my room before I was shot at. I was at the engine-room door, on the upper deck, where my room was. I found the body of the second engineer lying on the deck; it is more than I could tell whether he was alive or dead; he appeared

to be dead. I was in the act of stooping down to raise him up when I was shot at twice. I then walked forward and was shot at again; I supposed to be from a pistol. Next day I saw two places in the deck where pistol balls had gone through right by where I was. I can't tell who shot at me. I only saw two persons then. I cannot identify either of these prisoners as the parties. I saw no marks of violence on the engineer, but I saw marks of blood where his head lay. When I walked forward I was going into the pilot house, when I was collared and a pistol was put to my face by First Lieutenant H. A. Parr, who was in the pilot house. He collared me and said I was his prisoner in the name of the Southern Confederacy. Parr put the irons on me; two or three others stood beside him; they seemed to be standing there doing nothing. He put handcuffs on each wrist. The irons could be made small or large. They put me into my own room; I could have come out when I pleased; no use for them to lock the door. I don't know what became of the body of the second engineer, except what I heard from the others. I was confined an hour, when Parr and sailing master Robinson came to me. They didn't say much, but took me into the cabin; there I saw some of the other passengers who were not concerned in the affair. While I was there the chief mate, Charles Johnston, and chief engineer, James Johnson, were brought in wounded; I had heard reports of fire arms. The mate was wounded in the right knee and left arm; the wounds appeared to be made by pistol shots. I saw the leaden ball taken out of the mate's arm. He suffered considerably from the knee, not so much from the arm. Lieutenant Parr took the ball out of the arm. The chief engineer was wounded by a ball in the hollow of the chin. Parr said he would get the balls out of them if he could, and fix the wounds. The chief mate laid on a lounge until he was put on board of the pilot boat. I remained in the after cabin until eight o'clock next morning. The irons were then taken off, and Robinson went up to my room on deck with me; I was in the room a few minutes and returned to the cabin. When on deck I saw Collins and Seely there; Seely was scrubbing

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brass on one of the timber heads; the others did not appear to be doing anything in particular. Colonel John C. Braine took my ship's papers from me in the afternoon before I was landed in the pilot boat. Braine seemed to have command of the vessel. She was taken from me by these parties against my will and consent. I saw Mr. McKinney on board the vessel. They seemed to be about the vessel, and appeared to be eating the grub up as fast as possible. Don't recollect of seeing McKinney doing anything. The person who was navigating the vessel was named Robert Osburne, a passenger, one of the six who bought tickets in New York. None of the parties named in the warrant had tickets. The first land we made after they took possession was Mount Desert. I asked them where they were going; they said Grand Manan. I asked where they intended to land me; they said St. John. Mount Desert is on the American coast east of Portland. I would not see it if I were prosecuting voyage from New York to Portland. After passing Mount Desert we saw land east of that place. We proceeded to Seal Cove Harbor, Grand Manan. The boat was lowered, three or four men went ashore, remained a little while, and came on board again, when the steamer left and came up the bay to St. John. Next I was taken up to my room by Braine and Parr. Parr made a copy of Braine's instructions and Braine gave it to me. He ordered me to give up the coasting license and permits for the cargo, and the money I had collected from Braine for his party, in all \$87. He asked for the money he had paid over to me; it was my employer's money. I knew it would be worse for me if I did not. I handed it over against my will. Braine had a pistol in his hand at the time. I handed money, ship's papers and permits to him. The "papers" were the ship's "coasting license" from the New York Custom House, under which she was coasting at the time, as required under the American law. After this they (Braine and Parr) took me away from the room, took me aft, and ordered me to stay there. We then saw a pilot boat. We were on our way to St. John. The pilot boat ordered us to stop; some one came on board the steamer from her, stayed a few

minutes, and returned. Then Captain John Parker came on board and apparently took command. They then took the pilot boat in tow and steamed up to Dipper Harbor. All of the passengers and crew, except two engineers (James Johnson and Auguste Striebeck) and three firemen (Patrick Connor was one), were put on board the pilot boat. The firemen and engineers were kept against their will. Those who went on board the pilot boat were myself, Charles Johnston, the chief mate, Daniel Henderson, three boys and four sailors, whose names I do not recollect, the stewardess and five passengers. One of the passengers belongs some thirty miles back of St. John, the other four belonged to Maine. These five passengers had tickets. Robert Osburne remained on board the *Chesapeake*; he also had a ticket. The steamer towed the boat some five or seven miles and let go of us. We were put on board the boat about five in the evening; that was the last we saw of the steamer. I landed in St. John about four on Wednesday morning. I got a boat from a big ship near Partridge Island and came to town with four of my men and two passengers. From the way the parties acted in my steamer I was afraid of my life. Everything was taken against my will. I saw one or two of these prisoners on watch; they were on deck. I supposed they were on watch. They seemed to be acting as other men would who were on watch. Braine's party assisted him in charge of the vessel. As far as I know these men were assisting him. I did not see them making sail, or shoveling coal. I don't recollect of seeing Collins or McKinney doing anything except being on deck.

Cross-examined by Mr. Gray: I don't deny there has been war in my country for two or three years between those calling themselves Confederate States and the United States. [Mr. Wetmore objected to this as an improper way of proving a state of war. The magistrate did not think this evidence could be shut out.] I can't remember how many States are called the Confederate States—Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi (about one-third of the latter). Abraham Lincoln is President of the United States, and Jeff. Davis President of the

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Confederate States. I never heard of Mr. Benjamin, Confederate Secretary of War. I have *heard*, they say they have a government. I have read Lincoln's proclamation of war against the South, ordering them to destroy the property of the South, but I do not recollect its contents. I never took notice of it to—[Here the witness was stopped.]

Parr *did* put a pistol to my head in the pilot house and said he took me prisoner in the name of the Southern Confederacy. They put the irons on me rather hard. They did not say anything about taking the vessel in the name of the Confederate States then. After they took the handcuffs off there was always a guard with me when I went about. I did not see any act of violence towards the passengers after the capture of the vessel. The handcuffs were also removed from the officers. I left a copy of the "instructions," which Braine left with me, in New York. [Mr. Gray asked the captain the substance of these "instructions;" Mr. Wetmore objected. Mr. Gray argued the point, and then read from manuscript a copy of Captain Parker's order to Braine, (which Captain Willett had published in the N.Y. *Herald* and other papers), and asked the captain if the copy was correct. The witness said it was nearly correct. The name of the sailing master in the copy handed him by Braine was George Robinson, not Tom Sayers; the name of the engineer was not given in it, and the number of the men stated was eleven, not twenty-two. In other respects Mr. Gray's copy was correct.] (6). The Confederates kept of

(6) ORDERS FROM CAPTAIN PARKER TO LIEUT. BRAINE.
 ORDERS.

To Lieut. Commanding John Clibbon Braine, You are hereby ordered to proceed to the City of New York and State aforesaid with the following officers: 1st Lieut. H. A. Parr, 2nd Lieut. David Collins, Sailing Master Tom Sayers, 1st Engineer Smith, and crew of twenty-two men. You will upon arrival there engage passage on board the steamer and use your own discretion as to the proper time and place of capture. Your action towards crew and passengers will be strictly in accordance with the President's instructions. You will as circumstances may permit bring your prize to the Island of Grand Manan for further orders, Seal Cove Harbor if accessible.

(Signed)

JOHN PARKER,
 Capt. C. S. Privateer *Retribution*.

December 2nd, 1863.

my private property, one double barrelled gun, one single barrelled, five five barrelled revolvers, and one six barrelled revolver, (I did not come out of my room "in what they call my shirt tail.") They kept me aft and plundered my room. They took three coats. I missed them when I commenced to pack up. I brought ashore my clock, eight charts, sextant, three books. The passengers also brought ashore their own things. I did not see Braine give the passengers money to take them back to New York. The crew brought part of their things ashore. They put us into the pilot boat six or seven miles this side of Dipper Harbor. I did not see and do not know that the Confederate flag was raised over the vessel. They fired two shots at me, and I don't know how many more. The first two shots were fired at twelve feet. They must have been bad shots. The *Chesapeake* had two six-pounders forward, and of ammunition half a keg of powder. No cutlasses. The Confederates who cut out the *Caleb Cushing* at Portland were sent to Fort Warren; I have heard so. The *Chesapeake* was engaged in retaking the *Caleb Cushing*. I saw the Confederates who were then taken; they were sent to Fort Preble. I do not know that those Confederates were ever tried as pirates or in any other way. Only Lieut. Parr told us that their party was acting for the Confederate States. They all seemed to be working together, and were working under Parr and Braine. I was not at Sambro, and did not see the steamer after I got into the pilot boat. None of my crew to my knowledge were kept in irons the next day—the day after the capture. I never saw or heard of Braine or Parr before.

Re-examined by Mr. Wetmore:—I have heard the Confederates called rebels in the Northern States generally. The *Caleb Cushing* was lying at a wharf in Portland Harbor when captured. Braine was called Colonel: the parties all seemed to be working together. I cannot tell whether Braine paid the passage of these three men, the prisoners.

January 6, 1864.

EVIDENCE OF DANIEL HENDERSON.

Daniel Henderson, sworn—I belong to Portland, Me., I

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was second mate of the *Chesapeake* in the beginning of December. Five or six years ago I was employed on board her, and had been for two or three years. She was called the *Chesapeake* then, and traded from New York to Savannah, Charleston and Baltimore, and sometimes to Portland. She had previously been called the *Totton*, but when she was rebuilt her name was changed. She was owned in New York by H. B. Cromwell. She was latterly employed in the trade between New York and Portland. She lay in North River, New York, at Pier 9, on December 4th and 5th, and took in considerable cargo. She had a great deal of wine and cotton, and was nearly full. She left on Saturday 5th, about four o'clock in the afternoon. She had twenty-two passengers. This was not an unusually large number. She sometimes had fifty, or sixty, or seventy. The crew numbered all told—including the stewardess—eighteen. I paid no particular attention to the passengers, and the only one I knew was Braine, who had been a passenger from New York to Portland about a fortnight before, and then had a wife and child with him. He then said he had just come from England. The voyage usually occupied thirty-six or thirty-seven hours.

On Sunday night at twelve o'clock my "watch" was over and I went to bed. My room was on deck immediately adjoining the pilot house. I had not been in bed more than an hour and a half when four men came to my door, broke the lower panel, and then opened the door. This awoke me. The four men then stood holding pistols over me—pointed at me—and bade me get up and put on my clothes. I did so. They then ordered me to put my hands together and hold them up, and they put handcuffs or irons on me. They told me when doing this that I was a prisoner to the Confederate States. I asked them if I could not see the captain or someone belonging to the vessel. They told me "I couldn't see nobody." They then locked me in my room. About ten minutes after I heard a noise as if of a man falling on the deck near the pilot house door, and I then forced the door of my room open. The deck was covered with ice and I slipped and fell and then two of those

other fellows caught me by the shoulders and hauled me into the pilot house, where I sat in a corner.

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About twenty minutes after, Braine came in and said that the second engineer had been killed and thrown overboard. Several of those fellows went in and out of the pilot house while I was there. The prisoner Seely, who seemed to be keeping watch forward, went in twice to warm himself. A big tall fellow, with a long sandy beard, was steering. Neither of the other prisoners went in. He stayed some time there. One of the other fellows, an officer, came to me and asked me where the paint was; I told him in the paint lockers. The officer then ordered me to show him where it was, and I went down and showed him. The officer said they wanted to paint out the steamer's name and the yellow streak on the funnel. The officer held a pistol in his hand. I asked him to have the irons removed, but the officer refused. They were not taken off until the next morning about 7.30 o'clock. I was taken to the passenger cabin and found the mate there wounded in the right leg and left arm, lying on a mattress, and the engineer wounded in the chin, and others of the crew and passengers. I asked Braine to allow me to sit by the mate and attend him. Braine said he would see what could be done, and some time after told me I could sit with the mate, and I did so and washed his wounds. A man armed with a revolver sat by them, and another, also armed, kept guard at the cabin door. The prisoner McKinney was at one time on guard and was armed. When breakfast was ready they were taken to breakfast. Two men armed with revolvers stood on each side of the breakfast table, and McKinney, armed, stood on the stairs outside. I went on deck two or three times during the day, having obtained permission to do so. No guard accompanied me, but armed men kept guard on both sides of the steamer. Collins was one of the men on guard, and held a pistol in his hand. I saw Seely cleaning some brass work on the timber head. I was kept close prisoner all day, and pretty well down. At night they were all ordered below, the officers were put in the cabin and the rest of the crew in the forecastle, except the fireman, whom

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Next morning they made Grand Manan. Braine came down to the cabin and ordered me to go up and get ready the anchor to let go when they wanted to. This was, I understood, at the suggestion of the man who belonged to the other passengers, and not to those fellows, but who was acting as pilot for them. Braine, with a pistol in his hand, and the other man stood over me while I prepared the anchor. They reached a harbor and the anchor was let go. They then had breakfast. I did not eat much. I was too uneasy, as I did not know what was to become of me. I could not get any of them to tell me, and I did not know but I might have to go over the rail. After breakfast they lowered a boat and Braine and two or three of his men, as well as I could see through the cabin windows, went ashore. They remained two or three hours, then returned and weighed anchor. Some time after they met a pilot boat. The boat ordered the steamer to stop, and a man came on board the steamer from the boat, stayed some time, then went back to the boat, and soon after he and another man came on board the steamer and brought a valise.

I was kept aft on deck at the time and could see what went on, but could not hear what was said. The man went forward to the pilot house, could not tell what his name was, or whether he took command. This was two or three hours after they left Grand Manan. The steamer then proceeded towards Saint John, having the pilot boat in tow. Some time after, all of our crew were put on board the pilot boat except the two engineers and three firemen, who were kept on board the steamer, and five of the passengers were also put on board. The other passengers who had acted as pilots remained on the steamer. The five passengers who were put in the boat had been taken prisoners like the others. The steamer towed them to within about three miles of

Partridge Island, and then let them go and kept right on. It was about eight o'clock when the steamer left the boat. We stayed in the pilot boat until ten o'clock next morning, when we were brought to the steamer New England. Capt. Willett, with some of the crew, and all of the passengers, got a boat from a ship and came up to Saint John about four o'clock in the morning. I was in bodily fear from the time the vessel was taken from us and our crew until I got out of the pilot boat. I am not in the habit of being afraid under ordinary circumstances. The prisoners were on board the steamer when the pilot boat was cast off, and went off in the steamer; they had no place to land. Some of the parties got a stage over the stern, for the purpose of painting out the name of the steamer, and they said afterwards that they did so. They made our men paint the yellow streaks on the smoke pipe black. The *Chesapeake* carried the Stars and Stripes—the American flag. I never knew of her sailing anywhere except to American ports, and from one American port to another. The captain and crew had no control over her, or cargo, after she was taken possession of on Monday morning.

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The second engineer might possibly get the apparatus for throwing hot water without help, but I doubt if he could, at all events he could not do it in less than twenty-five minutes. He would have first to go on deck from his engine room, then uncoil the hose from the hose box and extend it along the deck, then attach it to the goose neck on deck, then take it down to the engine room and put the machinery in motion and after that return on deck to use the hose.

Mr. Gray said all this was immaterial, as if a man under such circumstances as would create the impression that he had the means of throwing hot water immediately threatened to do so, the effect would be precisely the same as if he actually had the means of carrying out such threat.

The witness also said I heard Braine and the chief engineer disputing as to whether the second engineer had fired a pistol shot. Braine said he must have fired the first shot. The engineer denied that he had fired, and said he would lay any wager that he could then, if Braine would let him

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make the search, find that pistol (it is presumed the pistol Shaffer owned) in the second engineer's room in his bed. I heard afterwards that it was found. I saw blood on the place where they told me Shaffer had fallen. Shaffer was nearly six feet high and a stout able man. He was a very kind, gentlemanly man, and very much liked by the whole crew. He was about 45 years of age, and I often heard him say he was born up North River, in the State of New York.

The only names I remember having heard were those of Braine, Parr, and Collins. All the party seemed to be acting under Braine's command.

Cross-examined by Mr. Gray: From the time the vessel was taken until I left the pilot boat I was in bodily fear. I have not told more than occurred. A great many things happened that I did not see. In coming to Saint John by train I did not get out at a way station, for fear of coming to Saint John. I came the whole way in the train. When the vessel was seized and they told me I was a prisoner to the Confederate States, I knew what they meant. I did not see the Confederate flag run up. I do not know that the North has taken many Southern ships: they may have taken some, but I do not know how many. I did not see the order given to the captain by Braine; heard something about it. The captain told me they had given him their names, but did not tell me they had given him a copy of the order. I was not treated with any unkindness, but the engineer was kept on duty after being wounded, and bleeding from the chin. I was allowed to take all my clothes when leaving the vessel. The cotton we had on board came from New York. Could not say whether it came from the Southern States or from Europe. Cotton is one of the chief productions of the Southern States. Have known cotton to come from Europe. No one was hurt who did not make any resistance to the capture. Did not hear Braine say that he gave orders to his men not to injure any one, unless in case of resistance. On Monday morning after they had secured possession of the vessel, all of our men, that I could see, were liberated from the irons. One of Braine's men told me that if I would keep quiet, and not attempt to re-

capture the vessel, they would take care of me. I believe the passengers got all their luggage. I lost nothing, and am not aware that any of the others lost anything, except what the captain spoke of.

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Re-examined: They told me they were acting in the name of the Confederate States. The chief engineer was forced to work after being wounded in the chin. I do not know what became of the second engineer's luggage. I did not know he was killed, as I was asleep at the time.

January 8, 1864.

EVIDENCE OF JAMES JOHNSON.

James Johnson deposed: Was born in Ireland; have been a resident of the United States fourteen years; am not a naturalized citizen of the United States; follow the business of engineer; know the steamer *Chesapeake*; was chief engineer of the steamer *Chesapeake*; have been chief engineer something over a year; have been on board the steamer *Chesapeake* three years last July; was on board the *Chesapeake* on the 4th and 5th December last; this vessel was engaged in carrying passengers and freight between New York and Portland; the steamer had something over twenty passengers on board on the 5th December; I had charge of the engine on the 5th; remained in charge up to 12 o'clock at night; nothing unusual occurred on Saturday night or on Sunday; I had charge of the engine again on Sunday night until 12 o'clock; was waked up between 1 and 2 o'clock on Monday morning by the report of pistols; went from my room on deck and found Mr. Shaffer lying on deck at the engine room door.

I knew the steamer fourteen years ago; she was then called the *Chesapeake*; have known her by the name of the *Totton*; she was at one time rebuilt; she was rebuilt in New York; she was afterwards called the *Chesapeake*; I had known her by the name of the *Chesapeake* before that time; she is owned by H. B. Cromwell, of New York; I raised the second engineer up when I found him lying on deck on the Monday morning of the capture; I called him by name; he was dead and lying with his feet down the hatchways; this was be-

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tween one and two o'clock; I saw no blood then, it was quite dark; saw two spots on his neck which showed blood; I then went below to the place from which the second engineer came up; there I got a pistol put to my head by Collins; I caught him by the arm, and told him to hold on; then a man beside Collins, whom I took to be Brooks, shot at me, the ball taking effect in the chin. [Mr. Gray objected to witness answering the question "who shot the second engineer." Brooks made a statement, it appears, to the witness with reference to the shooting of the second engineer, which Mr. Gray, objecting, the magistrate would not allow him to tell, as not being admissible in evidence.] I went across the deck below and spoke to Wade. Wade did not answer. I was fired at without a word being said to me. I had the ball taken out of my chin two days ago. It was taken out by Dr. Earle, of Kings County. The mate, Charles Johnston, was shot in the knee and in the arm. He and I went into the kitchen through a little hatch; we remained there for half an hour. While there I saw Mr. Shaffer's body going overboard. There were three or four persons engaged in throwing it over. Knew none of them except Braine. The body was thrown over just as it was when lying on deck. The cook came to the kitchen. I asked him where Capt. Willett was. He said he was in the cabin. I also asked him what was going on. He said the ship was taken. Robinson, the sailing master, took me to my room to dress, as I had only my night-clothes on. I had been asleep, and was awakened by the pistol shot. Robinson had no pistol with him that I saw. I heard two or three pistol shots.

After dressing I went to the cabin and found the captain there in irons; Robinson was with him; the mate was there wounded; Parr was there taking a shot out of Brook's hand; he then took a shot out of the mate's arm; Parr then tried to take the shot out of my chin, but could not, as he said it was fast in the chin; I do not remember to have seen any of these prisoners present; I had some conversation with Parr; he told me to keep the cold out of the cut; he assisted me in wrapping it up; we had no conversation in reference to the firing of the pistol. I spoke to Capt. Willett; I went

with Robinson to the engine room to see if all was right there; there was nobody there but Striebeck, the oiler or assistant; I went there against my choice. Capt. Willett asked me if the ship was safe; I told him she was not, and Robinson, overhearing my answer, got permission of somebody to take me there and see if there was any danger of the ship blowing up, as Striebeck was not an engineer, and had been on board the ship but a short time; did not remain there long; went back to the cabin after telling the oiler how much steam to carry; after being in the cabin an hour went back to the engine room; there was someone with me all the time—a guard, I mean; I was taken back on the second time to attend to the engine and see if the engine was all right; I was then acting for Mr. Braine; Braine said he had no engineer, and that I would have to act; I was not in a fit state to work, on account of the wound in my chin, which was bleeding; I had to be at the engine all the time, as I had no assistance; there was someone on guard all this time; the prisoners were among those who were on guard; those on guard were armed with revolvers; I was not threatened. Two by the name of Cox, and two by the name of Moore, Treadwell and Wade, and the three prisoners, also Lieut. Parr and Brooks, were among those on guard over me; the guard was changed at stated times; Braine had command of these men; these are all the names that I can remember; these men acted under the orders of Braine, Parr, and the sailing master; as far as I could see, Robinson was the sailing master; was in the engine room pretty much all the time; I slept on the locker in the engine room; I was not on deck much; did not see much that was going on on deck; the vessel did not stop till she reached Grand Manan. She remained there two or three hours; after leaving Grand Manan we sailed towards St. John, and got below St. John harbor about seven or eight o'clock on Tuesday evening; we remained at anchor. We stopped before reaching St. John, and got Parker on board from a pilot boat; he took charge over Braine; there was another gentleman, Mr. McDonald, came on board with Parker; he was introduced to me by Parr as Mr. McDonald; Mr. McDonald told me to

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content myself for a little while, as he would only keep me for forty-eight hours; he appeared to be concerned in the affair; told him I wished to get home, as my folks would be uneasy; he asked for my address, and he said he would send a despatch to my wife, and inform her that I was well and would be treated well; he forgot his kind intentions, however, as the despatch was not sent. McDonald went ashore here. I saw McDonald a few days ago; he came from Halifax to the Bend with me; I did not request him to come; perhaps he came to see that I got through safely. We remained off Partridge Island in the steamer from three to five hours: a boat went ashore, in which were Parker and Braine. I do not know any of the others, or what they went ashore for. They came back to the ship, and we started as soon as we could get steam up after they came aboard. I think McKinney went ashore with them. We did not take in any coal here; we left here about two o'clock next morning under steam; we got into Shelburne in the first place; got there about nine o'clock on Thursday night. Capt. Parker had charge of the vessel on the way to Shelburne; I was not allowed to go ashore, neither was any of the crew. There were four others of our crew taken away in the vessel; their names were Striebeck, Connors, Tracy, Murphy. I had charge of the engine; I slept a little at one time; I slept three hours in the cabin. We had a very heavy gale of wind, also snow on the passage, which commenced on Thursday morning. We lay at anchor in the harbor; we lay there all Thursday night; we took in coal and wood there from a schooner on Thursday night; Parker told me there were ten tons of coal and two cords of wood; here we discharged a large quantity of freight, including flour, sugar, tobacco and port wine; it was put on board a schooner; I do not know how much wine was put ashore; the wine was put up in quarter pipes: the wine was distributed about the vessel; I got some; Capt. Parker said that Kenney, a man living there, had bought a thousand dollars' worth of the cargo; Braine came back there in the day time; cannot say on what day; we lay there four or five days; we were there on Sunday; do not know on what day we sailed; Braine left the

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vessel again while there; he took a trunk with him; I heard there was jewelry in it; Braine did not come back there again; got no additional men or coals at LaHave; we got some wood; Parr told me that he was going away for a day or two; he would return, and bring Braine back, when he would endeavor to get the captain to liberate me, as it was too bad to keep me confined to the ship, wounded as I was and away from my family; Parr also said Braine had acted wrong in running off with the sum off \$400.

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(Mr. Gray objected to all evidence as to some statements made by Parr, and quoted from Roscoe's evidence in support of his objections. The magistrate ruled in his favor.) Witness resumed: Parr went away; I do not know where; we left that evening; I do not know the date; we got some wood there: we left LaHave and came to the mouth of the river, towing a schooner of about fifty tons, and loaded with part of the cargo of the *Chesapeake*. I cannot say what kind of a load we gave her, as it was at night, but it was a pretty good load. I did not hear Parker say what he got for this; we got some wood from the schooner; we remained at the mouth of the river, and then proceeded to Sambro, about twenty miles from Halifax; our coals lasted until we got there; got no additional crew at LaHave; Capt. Parker went from Sambro to Halifax for coal, but took no part of the cargo with him; he returned with a schooner load of coal, two engineers and two firemen; Parr had not returned; we commenced taking in the coal about two o'clock in the morning; I got up and spoke to Parker; he told me about the men he had got, and asked me to show the engineers the machinery; I told him I would after daylight. After that I was in my stateroom getting ready to leave, Parker having told me he was done with me, when the pilot (Flinn) reported to Parker that there was a gunboat in the harbor. Parker went on deck, and, seeing her, spoke to his new engineer about getting steam on. (This place they call Mud Cove.)

The engineer told Parker his men were not in order to get steam on. Parker then told me to scuttle the ship, but I told him I did not know how. He said I could cut a pipe,

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and I said we had no pipes that I could cut. Parker left the cabin then. I carried my clothes on deck, and found him and his crew leaving the vessel, and very good time they made. The three prisoners were among them. I then got an American color out of the wheel house, and one of the firemen to run it up, Union down. The gunboat came alongside and boarded us. She was commanded by Lieut. Nichols. There were none on board the *Chesapeake* then but myself and my three firemen, the two new engineers, who were left behind, and one oilman. There was no steam up then. Nichols asked me who was on board, and I told him. We tried to get up steam, but we had not coal enough, and no oil on board.

About an hour and a half after this we left, and proceeded to Halifax in company with the *Ella and Annie*; the *Dacotah* was behind us: I stayed in Halifax until Monday last: Parker, Braine and Parr had charge of the *Chesapeake* from the time she was captured until they left her at Sambro. Capt. Willett and his crew had no control over her; I did not act of my own free will, but under orders from these people; I went to the second engineer's room in company with Parr and Striebeck, and found a pistol there, which I handed to Parr; he examined it and said it had not been used. In the second engineer's drawer I found the pistol.

The second engineer's room was on the deck above where he attended the engine, and the same deck on which I found him dead; I hired him about two years ago, and have never known him to carry a pistol; I would have known it if he had done so; there was no means of putting boiling water on deck, nor were there at any time; there was a force pump to throw cold water in case of fire; I saw these prisoners every day from the time the vessel was captured until they left her at Sambro; they all carried revolvers; I do not know what position Collins occupied.

Cross-examined by Mr. Weldon: When Brooks got to the cabin he was wounded in the left hand; Parr cut the ball out; I heard nothing said about the engineer shooting him; I found the second engineer dead at the top of the gangway; his duty was below; I went down and saw Brooks,

who flashed a pistol within about two feet of me ; the ball struck me in the hollow of the chin ; did not knock any teeth out, but was bedded in the bone. I had it taken out the day before yesterday from the outside. After being shot I went into the kitchen through a hatch used as a dumb-waiter ; this may have been cowardly, but I could not help it ; I remained there about a half an hour, when I was taken to the cabin, and Parr cut the wound, but could not get the shot out ; he then dressed it, and told me to keep the cold out of it ; he took the ball out of the mate's arm ; I did not hear the Confederate States mentioned at all, nor did I hear Braine say to any one that they were acting in the name of the Confederate States ; they used a Secesh flag in Shelburne ; I cannot describe it ; it did not seem right to me ; cannot tell how many colors were in it ; I could not describe four weeks from now a " rag " that I had seen to-day ; it was not the Stars and Stripes.

Parr did not tell me they had taken the *Chesapeake* for the Confederate States, but said that he and Braine had travelled in her about a month before for the purpose of taking her ; he also told me he had been in the Southern army, and was a released prisoner, but did not say what part of the Southern States he came from ; he treated me very civilly ; said Parker had not fulfilled his word, and that he would try and get me away ; they did not get any new engineers at Shelburne—they would have to " make them " there ; I was allowed to go on deck alone occasionally, and took my meals in the cabin ; when the vessel was first taken Braine told me he had no engineer, and I worked the vessel to Grand Manan. Parker then came on board ; told me he would have to keep me a little while, and asked me how much money I wanted ; I said not to mind money, I would run the ship if I had to do it ; I suppose Braine acted under Parker after the latter came on board ; there was a guard in the engine room, in the fire room, and on deck all the time ; Parker said Shelburne was his native place ; did not say he had been in the Southern States ; I had never seen him before ; we put into Shelburne, LaHave and Sambro, and were about four miles inside Sambro and about half a mile from the shore

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 CHESAPEAKE when the *Ella and Annie* took us; when Parker and his party left they took one boat with them; Wade must have gone on board the schooner, as he was found there by some of the crew of the *Ella and Annie*; I was left in charge of the *Chesapeake*; the two Halifax engineers and Wade were the only persons taken on board the *Ella and Annie*; the *Dacotah* lay off the harbor, and after speaking her we proceeded to Halifax, having got orders to that effect from her commander; I was kept only until they got engineers; I did not expect any money, nor would I have taken any were it offered.

Re-examined by Mr. Wetmore: The watch in the engine room and fire room were armed; I don't know whether the watch on deck was armed.

January 11th, 1864.

Mr. Wetmore put in evidence: Certified copies of the following Acts of Congress:

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| Act of Congress, 1819, cap. 75, Statutes at Large, 3 vol. 514. | |
| do. 1820, cap. 113, | do. id. 600. |
| do. 1823, cap. 7, | do. id. 721. |
| do. 1823, cap. 72, | do. id. 789. |
| do. 1825, cap. 87, | do. 4 vol. |
| do. 1847, cap. 51, | do. 9 vol. 174. |

Also proclamation of President Lincoln, dated April 19th, 1861.

EVIDENCE OF CHARLES WATTERS.

Charles Watters was called and testified as follows: I reside in Carleton; have resided there twelve years; know the prisoners Seely and McKinney; had no conversation with Seely or McKinney on the subject of the capture of the *Chesapeake*; had heard a good many speak about it in their presence; I heard their conversation in Lower Cove, in the City of Saint John; McKinney was present; the two Coxes were present; do not know the names of the streets in Lower Cove; do not know in whose house this conversation took place; after going down Charlotte street, would turn to the left in order to reach the house in which the conversation took place; it was the next street to the last street which runs east and west. [Procuring a plan of the city, the

witness pointed out Main street as the one on which the house was situated where these meetings and conversations took place.] The house was on the right side of the street; it was a workshop; it was reached through a yard; saw the captain there; think his name was Braine; heard conversations there; the captain was not present; his name was Parker, as I since heard; he was a middling tall man; the captain said he wanted a crew of twenty men to go to New York to capture a vessel; we were all to have a share, do not know how much each man was to receive; did not hear anything about payment for the service; we were to have our passage paid to New York; Parr was to pay the passage; the prisoners were present at one of the meetings; there were two meetings; did not hear anybody say they would go; the prisoners were present at the second meeting; there were very few of the boys present at the first meeting; the captain appointed the second meeting; never saw Collins before to-day. Have had no conversation with McKinney about the affair; had no conversation with Seely about it; I went over to Carleton in the same boat with Seely; I was present when the American boat went off, and Seely and McKinney were there. About a week after the last meeting I heard that the *Chesapeake* was captured; it was asked at the last meeting by the captain if those present would go; I cannot say that I heard any one assent; I was not present at the first meeting; I saw the prisoners Seely and McKinney the same night that the last meeting took place, before the meeting; I do not know how many meetings were held; I had a conversation with McKinney and Seely on the road to the meeting, when the prisoners said they would go to the meeting; the two Coxes and a man named George Robinson were with us; Robinson asked the boys to go; they asked where they were going to, and he stated they would find out when they got there; when I speak of "they" I mean the prisoners and the others; they asked what they were going for; Robinson said they were going to see Braine, who was holding a meeting for the captain; couldn't say what was said on the way; Robinson called at the Lawrence Hotel and got Captain Parker, and we all went to the place of

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 CHESAPEAKE meeting; I heard sometime before the meeting that this man wanted to get a crew for the purpose of taking a steamer; those who intended to go were to go the next morning; I was present when the American boat left, and saw McKinney and Seely there; Seely was brought up in Carleton; I did not intend to go; I went to the boat to see who was going; of those men who were at the meeting I only saw McKinney and Seely; they were on the upper deck of the boat; did not know where they were going; I bid the time of day to them; I was there about a quarter to eight o'clock; I left the wharf before the boat left; I heard the steamboat bell ring before I reached the wharf; I was at the head of the wharf when the fastenings were cast off; I saw the prisoners about five minutes before this.

Cross-examined by Mr. Gray: It was stated at the meeting by Captain Parker that they were going on behalf of the Confederate States to take this vessel; I think that it was stated at the meeting that this prize was to be divided among the crew by the Confederate Government; Captain Parker stated that he had a commission from the Confederate Government; the captain produced a paper which purported to be a commission from the Confederate Government; the paper was read over; I did not hear what the paper contained; it commenced as near as I can remember "Jefferson Davis, President of the Confederate States of America." [Mr. Gray here produced a document which he refused to allow Mr. Wetmore to see. It was understood, however, that it was the order of Jefferson Davis to Captain Parker to go privateering.] I think the intention was expressed at the meeting that the vessel was to be taken for the Confederate States, or else they would not have gone; at the time that I heard that Captain Parker and Lieut. Braine wanted a crew, I also heard that they were officers in the Confederate service; I heard at the same time that they wanted to raise this crew for the Confederate service for the purpose of taking this vessel; it was understood that this crew when raised was to be in the Confederate service. I did not hear it said that Parr had been an officer with General Morgan; I was not sufficiently close to see the paper that Capt.

Parker read, so as to be able to identify it; I did not see the mark upon it; I was not sufficiently near the paper to see it so distinctly that if it was now put into my hands I could identify it; did not see Braine there the first night; he was styled Lieutenant; did not remember that Captain Parker stated that he was Captain of the Privateer *Retribution*; went to Lawrence Hotel for Captain Parker, then went down to the place of meeting.

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Re-examined by Mr. Wetmore: I told you all you asked me. The vessel was to be a Confederate prize. I do not know what share we were to have. I think the steamer was to be brought to Grand Manan to land her passengers. There was some talk at the meeting about taking the vessel to Nova Scotia. It was talked among the men that the vessel was to be taken to Nova Scotia. The question was asked if the vessel was to be taken there. I did not hear it asked, and I did not hear the answer. I did not hear what the vessel was going to Nova Scotia for. The men were to have a share. I do not know what they were to have a share of. I can't say that they were to have a share of the vessel and cargo. I did not hear when or where the division was to be made. I did not hear who was to make the division. I heard from Robinson that Parker and Braine were officers in the Confederate service. I did not intend to go with the men. I went to the meetings to see and hear what was going on. It was stated at one of the meetings that the men would be protected.

To Mr. Gray: It was stated that the men would be protected by the Confederate Government. It might have been intended that the vessel should go to Nova Scotia for coal.

January 21st, 1864.

Mr. Wetmore put in evidence:

Certified copy of coasting license granted to the steamer *Chesapeake*, under certificate of H. Barney, Esq., Collector at New York.

Certified copy of certificate of enrollment of the *Chesapeake* at New York.

The evidence for the prosecution closed.

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At the close of the evidence for the prosecution, the depositions were read over to the prisoners and being asked, with the usual caution, what they had to say, Collins replied as follows :

“ I am not guilty of any of the charges alleged, and in any and every act done by me, in any way connected with the taking and capture of the *Chesapeake*, I say that act was done under the authority and in the service of the Confederate States of America, Jefferson Davis, President, as I then believed, and now believe. And I utterly deny that I am guilty of either piracy, murder, or robbery on the high seas, or of any crime or offence whatever, and I positively assert that I never contemplated piracy, murder, or robbery, or any other crime or offence, and do not believe I have committed any.”

(Signed) D. COLLINS.

The other two prisoners made and signed similar statements.

THURSDAY, 28th January, 1864.

The following witnesses were then called for the defence :

EVIDENCE OF JOHN RING.

John Ring, sworn: I live in Carleton, lived there all my life. I know two of the prisoners, McKinney and Seely. I know Charles Watters. I was present at the meeting spoken of by Watters, about the *Chesapeake*; Watters was there; McKinney and Seely were there. It was proposed to enter into the Confederate service at that meeting. I saw Braine there, a man they called Braine. I saw a man called the captain; did not see Parr. I was at both meetings; some man showed a paper which the captain said was his authority. I would know that paper if I saw it; I know it by a large seal not quite at the corner—a man's head and shoulders. There is another seal on it, on the right hand side, looking like a blot; I minded it when the man read it. I saw it afterwards in Mr. Gray's hands. Jefferson Davis' name was at the bottom of it. I went up and saw what it was when he had done reading. This is the paper which was produced at the meeting. I swear this is the paper the man read at the meeting. I made a mistake about the head and shoulders of

the seal. He had just done reading as I went in. This is the identical paper (7). 1864
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Mr. Gray offers the paper in evidence as part of what took CHESAPEAKE place at the meeting.

The magistrate declines to receive it until it is proved genuine.

Cross-examined: The seal on the right hand looked like a small blot. I cannot say on which side it was, inside or outside.

EVIDENCE OF JAMES TRECARTIN.

James Trecartin, sworn: I live in Carleton. I was present at the last meeting. Ring was there. I think Watters was there. It was proposed to enter into the service of the Con-

(7) COMMISSION OF THE C. S. PRIVATEER "RETRIBUTION," AND TRANSFER TO CAPTAIN PARKER.

JEFFERSON DAVIS,

President of the Confederate States of America.

To all who shall see these presents,—Greeting:

Know ye, that by virtue of the power vested in me by law, I have commissioned and do hereby commission, have authorized and do hereby authorize the vessel called the *Retribution* (more particularly described in the schedule hereunto annexed), whereof Thomas B. Power is Commander, to act as a private armed vessel in the service of the Confederate States, on the high seas, against the United States of America, their ships, vessels, goods and effects, and those of their citizens, during the pendency of the war now existing between the said Confederate States and the said United States.

This commission to continue in force until revoked by the President of the Confederate States for the time being.

Given under my hand and the seal of the Confederate States at

[L. s.] Richmond, this 27th day of October, A. D. 1862.

By the President, (Signed) JEFFERSON DAVIS.

(Signed) J. P. BENJAMIN, Secretary of State.

Schedule of description of the vessel.

Name — *Retribution*.

Tonnage — 150.

Armament — 3 guns.

No. of crew — 30.

(Endorsed.)

State of South Carolina, }
District of Charleston. }

I hereby transfer the command of the schooner *Retribution* to John Parker. Witness my hand and seal, this twenty-first day of November, 1862.

Witness. (Signed) THOMAS B. POWER. [L. s.]

(Signed) W. F. COLCOCK, Collector.

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federate States. I was introduced to Captain Parker. I heard a man called Braine was there. I asked the captain what was his authority, and he pointed to a gentleman and said he will show you my authority; he produced an envelope. He took a paper out, and I saw the red spot on the back. He then read it out. I saw the large seal afterwards on it. It commenced "Jefferson Davis, President of the Confederate States of America." It was signed on the right hand side "Jefferson Davis."

Cross-examined: It was a round red mark. "Jefferson Davis" was written out in full; there was nothing after it. I saw the paper once at Mr. Gray's; do not recollect the day. I think it was Thursday, 7th instant, in the evening. I gave the description of the paper to Mr. Gray, and then he showed me the paper. Mr. Gray and Mr. Weldon were there. I swear this is the paper from the mark shown; the small red seal of the paper. It was a red seal. It was a diamond stamp. I could not say whose name was there.

A certified copy of the commission establishing a court in the Province of New Brunswick, for the trial of piracy and other offences committed on the high seas, passed at Westminster the 11th day of April, 1829, by writ of Privy Seal, put in evidence and read.

January 30th, 1864.

Certified copies of the letters of the American Consul to Mr. Tilley, (1) and affidavit accompanying them, put in and read.

EVIDENCE OF LUKE P. BLACKBURN.

Dr. Luke P. Blackburn being sworn, said: I am a resident of the Confederate States. Reside in Natchez, Mississippi. I was appointed Medical Director of the State of Mississippi, in January, 1863. I left the Confederate States on 16th July last. I am a native of the State of Kentucky. Have resided in the Southern States since March, 1846, and have been connected with the armies since the difficulty between North and South commenced. Am intimately acquainted with Jefferson Davis, President of the Confederate

(1) See *ante*, p. 208.

States. Know his handwriting; have corresponded with him. Know the provisional seal of the Confederate States. A new seal and a new flag were adopted in May last. Am acquainted with Mr. Benjamin, who in October, 1862, was Secretary of State. The Provisional Government was established in April, 1861. Mr. Benjamin acted as Secretary of War for only a short period; he is now Attorney General. [Mr. Gray here placed in the witness's hand Capt. Parker's authority (7), and asked him to identify the signatures and seal.] Witness: The signature is that of Jefferson Davis, and the seal is that of the Confederacy. I think that is the signature of Mr. Benjamin. The seat of government was removed to Richmond in the fall of 1861. A very terrible war is now going on between the United States and the Confederate States. Prisoners are exchanged. We are recognized as belligerents; sometimes this rule is infringed by the North. I have just arrived from Montreal. Left that city last Saturday. Charleston, South Carolina, is in the Confederate States, and is likely to remain so. Confederate Government issues letters of marque and have vessels of war too. They issued letters of marque in 1862. The South has a small navy but a very efficient one. I know the South has a vessel of war called the *Alabama*. In 1862, the States composing the Confederacy were: Texas, Louisiana, Arkansas, Missouri, Kentucky, Tennessee, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, and Virginia.

EVIDENCE OF ALONZO G. COLEMAN.

Alonzo G. Coleman, sworn: I am a resident of the Confederate States. Was born and brought up there. Am a native of Alabama. Previous to the war my father had large estates in Alabama. Have been in the Confederate service since May, 1862. My rank is that of a private. [There was an objection raised to Mr. Gray asking witness whether according to the practice of Confederate service, officers commissioned for any particular duty have not power to delegate authority and appoint others under them to aid

(7) See *ante*, p. 241.

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in carrying out that duty? The magistrate allowed the answer to be given.] I have known a captain to delegate authority to subordinates under him to do a particular act. I have known it to be done. They have authority to do this. Though a private I have myself been appointed by my captain to act as lieutenant to do a particular duty. The acts spoken of were recognized by our commanding officers. I know of such acts being a recognized part of our service. I mean by commanding officers, not captains but generals in command. In cases of parties so acting being taken prisoners by the Federal authorities, they are regarded as prisoners of war. The Southern ports are *looked upon* as blockaded. I knew nothing of the *Chesapeake* matter until brought here.

Cross-examined by Mr. Tuck: I was not an officer, but was regarded as an officer when placed in command of a party. I only received private's pay. If a lieutenant places a private in command of a party to act for him, he is privileged to act as lieutenant commanding.

EVIDENCE OF CAPTAIN THOMAS HERBERT DAVIS

Captain Thomas Herbert Davis, sworn: I am a native of Virginia. Am in Confederate service. Am a captain. I went into the service in South Carolina at Fort Moultrie, when the *Star of the West* came up. I went in as a private, and have gone up through all the grades to a captain. Have been in active service. Have been with Lee's army. Have been with it until within the last six months, during which time I was a prisoner at Johnson's Island. Have served under Johnson, Beauregard and Lee. My division general is Picket. I belong to Longstreet's corps. I have been in every battle except the seven day's battle at Richmond, and the battle of Chancellorsville. I was wounded at Seven Points. Was taken prisoner at Gettysburg, and sent to Johnson's Island, from which place I escaped on New Year's night. That was the coldest night I felt for twelve years. I rode fifteen miles and walked some 120. I borrowed the horses I rode, or rather I took them while the farmers were asleep. According to the practice of our service, officers

commissioned to do a particular duty have power to authorize and appoint others to do that duty, or aid in carrying it out; I have exercised it myself. Such acts have always been recognized by my general officer, and I suppose by the government; to my knowledge no objection was ever made. It is no novel thing for these appointments to be made. When the persons so appointed to act have been taken prisoners by the Federal authorities, they have been regarded as prisoners of war. I was so treated myself. My field officer and two ranking captains were shot at Gettysburg. After that until wounded I commanded the regiment. I was then unable to get off the field, and was taken as a prisoner of war by the Yankees, and transferred to Johnson's Island. A person appointed by a captain to do a particular duty, if taken, is regarded as a prisoner of war. I believe this to be the recognized rule of the service. Did not know Colcock, Collector at Charleston.

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Cross-examined by Mr. Wetmore: If I wanted a person to do a particular duty, and was deficient in officers, I should appoint some person of less rank for the time being; he would hold the higher rank in the discharge of that particular duty. In our volunteer service, officers and men frequently mess together. I don't know that in any exchange of prisoners, a private is given for an officer. I know, however, that the Federals hold four hundred persons at Johnson's Island, who prior to the new organization of the regiments held commissions, but afterwards, having been voted out, occupied the position of private citizens, with a view to their exchange for officers. I could make an orderly sergeant a captain, to do a particular duty in event of there being no lieutenant. The person appointed to discharge a particular duty in this way would be respected and obeyed by the men. These appointments are not officially notified to the general in command, except by the regular morning's reports. If a general came along and heard of the appointment of a subaltern in the manner described, he would recognize it. Never heard of Braine except in connection with the *Chesapeake* affair. Don't recollect that name among the army officers. There are so many officers in the service that it is impossible to remember the names of them all.

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EVIDENCE OF E. TOM OSBORNE.

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Ephraim Tom Osborne, sworn: I belong to Kentucky; am in the Confederate service; have been serving with General John H. Morgan since he was a captain; the Yankees call him a guerrilla; have been in active service two years; was on detached service the rest of the time; was taken prisoner on the 19th July last; escaped from Camp Douglas on the 2nd December last; General Morgan escaped from Columbus, Ohio, previously. According to the practice of our service, officers commissioned to a particular post, or to do a particular duty, have power to delegate their authority to others; I have known it to be the case. One year ago this winter I saw it done almost every day. The reports of such appointments are made to the colonel, and from him to his superior, and so on until it goes to head-quarters. [Mr. Wetmore here observed that these reports were most likely going on yet, to which the witness observed they might stop when they reached Richmond. The quiet, yet cutting, way in which this retort was given caused some merriment in Court.] When persons so appointed have been taken prisoners they have been treated as prisoners of war. I arrived here this morning; all of our party arrived this morning; I have seen some account of the *Chesapeake* affair in the papers.

EVIDENCE OF EBEN LOCKE.

Eben Locke, sworn: Am a Nova Scotian; am a sea-faring man; am a captain; Shelburne, N. S., is my native place; have a brother called Vernon G. Locke, who goes by the name of Captain Parker. He left Nova Scotia, about twenty years ago when a boy. He has been living in the States ever since. Believe his family live in Fayetteville, N. C. I have been in Wilmington, N. C. Was in Nassau this summer. Saw there a Confederate vessel called the *Retribution*. She was called a privateer. She had the Confederate flag flying. Saw there my brother in command of the *Retribution*, passing under the name of Captain John Parker. He was received and recognized as captain. He showed me his commission. I asked him to do so. I asked him either for

his commission or letters of marque. The paper placed in my hand is the one he showed me at that time. It is in the same state now as it was then. I remember the writing on the back distinctly. My brother was on board of my vessel at Nassau. Had not seen him for twenty years. In consequence of what I heard at Nassau, I found that Captain Parker was my brother. Next saw him at Sambro, N. S. He was then in command of the *Chesapeake*. He was the same Captain Parker, my brother, whom I saw at Nassau. I saw this same commission in his own hand in Halifax. How it got into your hands I don't know.

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Cross-examined by Mr. Tuck: I read part of the paper. Read enough of it to know that that is the same paper. Don't know why my brother changed his name. Don't know that my brother sailed out of Boston. Know that he sailed out of New York, and out of Cape Cod. Don't know how long since he sailed out. Never saw the *Chesapeake*. I went down from Halifax to Sambro; half an hour before I arrived she had left. Never changed my name. Stayed two hours at Sambro. My brother remained till I went to Halifax. Got a carriage and brought my brother there; then went home, sixty miles east of Halifax. Don't know where my brother now is. Don't know anything about Braine or Parr. Have not heard of Parker since leaving Halifax. Got none of the cargo at Sambro, nor did any of my family. Did not see any of the cargo belonging to the *Chesapeake*. My brother did not tell me of selling parts of the cargo all along the shore.

Re-examined by Mr. Gray: My brother is a Nova Scotian by birth. He told me his family was at Fayetteville. Some questions put by the learned counsel as to the conversation he had with his brother were objected to.

The Queen's proclamation of the 13th May, 1861, as to the observance of neutrality pending the hostilities between the United States and the Confederate States of America, was put in evidence by Mr. Gray.

February 10th, 1864.

John Driscoll, being acquainted with Captain Parker's

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 and also to commission to Collins (8).
 W. C. Watson produced the register of the *Kate Hale*, a
 Confederate vessel, registered in Charleston, South Carolina,
 and by comparison proves the hand writing of "W. F.
 Colcock," Collector of Charleston, to the endorsement on
 the letters of marque (7).

The evidence for the defence here closed.

February 15th, 1864.

Mr. Gray moved for the discharge of the prisoners, on a
 variety of grounds; but as they appear in the argument be-
 fore His Honor Mr. Justice Ritchie, together with the autho-
 rities cited in support of them, they are omitted, except the
 following authorities which were not cited by the counsel
 before the Judge:

The Dos Hermanos (1); *The Amiable Isabella* (2); *Brown*
v. U. S. (3); *The Hiawatha* (4); *U. S. v. Klintock* (5); *U. S.*
v. Smith (6); *The Marianna Flora* (7); *The Apollon* (8); *The*
Divina Pastora (9); *L'Invincible* (10); *The Savannah*, crew
 tried in Philadelphia, in 1861; *The Saladin*, before the court
 in Halifax, in 1843.

After hearing Mr. Gray and Mr. Weldon, in support of
 these objections, and Mr. Wetmore, on the other side, the
 Police Magistrate adjourned to

(6) See *ante*, p. 222.

(7) See *ante*, p. 241.

(8) COMMISSION TO DAVID COLLINS.

TO DAVID COLLINS.

Reposing confidence in your zeal and ability, I do hereby authorize and
 commission you to hold and assume the rank of 2nd Lieutenant, and this
 shall be your authority for any act, under orders from me, against the govern-
 ment of the United States, against the citizens of the United States, or against
 the property of either, by sea or by land, during the continuance of hostili-
 ties now existing. This commission to bear date from the 1st day of Decem-
 ber, A. D., 1863.

(Signed)

JOHN PARKER.

- | | |
|---------------------------------|---------------------|
| (1) 2 Wheaton 76. | (6) <i>id.</i> 154. |
| (2) 6 Wheaton 1. | (7) 11 Wheaton 1. |
| (3) 8 Cranch 132. | (8) 9 Wheaton 362. |
| (4) Appen. to Wheaton, Int. Law | (9) 4 Wheaton 52. |
| (Lawrence), 16, 24. | (10) 1 Wheaton 238. |
| (5) 5 Wheaton 152. | |

February 24th, 1864.

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When His Worship gave the following judgment :

After recapitulating the evidence he proceeded as follows :

In giving judgment in the case, I shall first consider the effect of the evidence given on behalf of the prosecution, and what it discloses : 1st. It discloses the fact that the prisoners and a number of persons met together in Lower Cove, in the City of Saint John, without authority from this or any other government, and came to the conclusion to proceed to New York and take a steamer, the design being that they were to take passage on board of the steamer and capture her on her voyage—the work, I say, of a coward and a villain, which ought to be considered as against all law—human or divine. This was accomplished, and the vessel seized, as appears by the evidence.

Now, upon examination of the law between a master mariner and his passengers, it will be found that the grave responsibility of the person to whose skill and conduct life and property are entrusted on the ocean, and the situations of unforeseen emergency in which he may be compelled to exert himself for the passengers' preservation, render it necessary that he should be invested with large, and, for the time at least, unfettered authority. Obedience to this authority, in all matters within its scope, is a duty which should be cheerfully discharged by every passenger on board the ship. Whatever is necessary for the security of the vessel, the discipline of the crew, the safety of all on board, the master may require not only of the ship's company, who have expressly contracted to obey him, but of those also whom he has engaged to carry to their destination, on the implied condition of their submission to his rule. Therefore a passenger who is found on board in time of danger, is bound, at the master's call, to do works of necessity in defence of the ship if attacked, and for the preservation of the lives of all on board.

Now I shall consider the effect of the evidence, and what it discloses, produced on behalf of the prisoners, touching the seizure of the *Chesapeake*.

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1st. It appeared that a most terrible civil war was existing between the Federal States and the revolted Confederate States, and that they have been recognized by Great Britain as belligerents.

2nd. That the authority to seize and take the *Chesapeake* rests entirely on the authority and position which John Parker, *alias* Vernon G. Locke, held under the authority of the Confederate States. Now what was his position and what authority had he from the Confederate States to authorize him to commission persons in New Brunswick to commit this act? Does the talk at the meetings at Lower Cove about the Confederate service and officers of the Confederate service, and the presenting the letters of marque, give Parker, *alias* Locke, any power? I apprehend not. From the fact that Vernon G. Locke having possessed himself of the letters of marque at Nassau, a British port, constituting the vessel *Retribution* a private, not a public, armed vessel, in the Confederate service, whereof Thomas B. Power was commander, and there appearing on the back thereof an endorsement transferring the command of the *Retribution* to John Parker, and he, Locke, having assumed the name of John Parker, and there being no authority shown for making this transfer or that Locke was the person to whom it was in fact made, does not, I apprehend, give Locke the power on behalf of the Confederate States, to plan in the Province of New Brunswick the expedition, and create at will, officers for the Confederate service during the pendency of the war.

Now this brings me to the questions which I have to decide. 1st. There are the proceedings had before His Excellency, and his warrant in this matter. I decide that the jurisdiction given to His Excellency under the Imperial Act is not a subject matter for me to enquire into.

2nd. As to my own jurisdiction. I hold that under the 10th section of the treaty, and the Imperial Act, I have jurisdiction in cases of piracy, and that this jurisdiction extends to piracy committed on board of American vessels on the high seas, as well as for piracy committed against the muni-

cipal laws of the United States. I have carefully examined the authorities cited upon this latter point, namely: Piracy by the law of nations, and piracy by municipal law of the States. I find it stated in a note in "Wheaton" that in the construction of the British Treaty of Extradition, a crime committed at sea on board of an American vessel has been considered the same as if committed in the territory of the United States.

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Vattel says that the domain of a nation extends to all its just possessions, and by its possession, we are not to understand its territories only, but all the rights (*droits*) it enjoys. He also considers the vessels of a nation on the high seas a portion of its territories.

The other points raised I have carefully considered, and have endeavored to search out a justification for the act perpetrated by the prisoners at the bar and the other persons charged, and I must confess I can find no justification. Taking the whole circumstances of the capture of the *Chesapeake* it was not *jure belli*, but she was seized and carried away *animo furandi*. It was not a belligerent capture but a robbery on the high seas. Therefore I consider—1st. That this is an act of piracy; 2nd. That it is justiciable by the Federal judicary and therefore, 3rd. I consider this to be rightfully a case of extradition.

It now only remains for me to declare to you David Collins, and to you James McKinney, and to you Linus Seely, that I shall commit you on the charge of piracy to the common gaol of the City and County of Saint John, there to remain until you are handed over to the United States authorities, pursuant to the requisition made to His Excellency.

The Police Magistrate having issued a warrant of commitment (5) in accordance with his decision, the prisoners were committed to the gaol of the City of Saint John, and an application being at once made to His Honor, Mr. Justice Ritchie, he issued an order in the nature of a habeas corpus under 19th Vic. Chap. 42, returnable before him at the

(5) See *ante*, p. 215.

1864 Judge's Chambers, in the Law Society's rooms, in Saint
 THE John, on the 26th February.
 CHESAPEAKE February 26th, 1864.

James A. Harding, Esq., High Sheriff of the City and County of Saint John, attended before Judge Ritchie, and made his return to the order of the Judge (9).

The order and return having been filed and read,

Gruy, Q. C., applied on the part of the prisoners, for an order to the Police Magistrate to produce the evidence and proceedings, taken before him on which the warrant for the commitment of the prisoners was issued. He referred

(9) RETURN OF THE SHERIFF TO THE ORDER OF HABEAS CORPUS.

SUPREME COURT.

I, James A. Harding, Sheriff of the City and County of Saint John, having charge of the gaol of the said City and County, do hereby certify that David Collins, James McKinney and Linus Seely, named in the annexed order, were in the gaol of the City and County of Saint John, for safe keeping, under a warrant from H. T. Gilbert, Esq., Police Magistrate and Justice of the Peace, from the following dates: James McKinney, from the 26th day of December last, David Collins from the 27th day of December last, and Linus Seely from the 1st day of January last past, except when ordered for examination by the said H. T. Gilbert, Police Magistrate and Justice of the Peace, up to 11 o'clock or thereabouts, on the morning of the 24th day of February, inst., when they were taken to the office of the said H. T. Gilbert, Police Magistrate and Justice of the Peace. That they were committed to the gaol of the said city and county, at mid-day of the 25th day of February, inst., with the following, a copy of the commitment:

City and County of Saint John, to wit: To any Constable, or Peace Officer, of the City and County of Saint John, and to the keeper of the gaol thereof; you, the said constable, shall convey David Collins, of the City of Saint John, laborer; James McKinney, of the same place, laborer, and Linus Seely, of the same place, laborer, charged before me, Humphrey T. Gilbert, Esq., Police Magistrate for the City of Saint John, and one of Her Majesty's Justices of the Peace for the City and County of Saint John, acting under warrant under the hand and seal of His Excellency the Honorable Arthur Hamilton Gordon, C. M. G., Lieutenant Governor and Commander-in-Chief of the Province of New Brunswick, bearing date the twenty-fourth day of December, in the year of our Lord one thousand eight hundred and sixty-three, and made and issued in pursuance of the Act of Imperial Parliament, intituled "An Act for giving effect to a treaty between Her Majesty and the United States of America, for the apprehension of certain offenders," and in pursuance of and in accordance with the said treaty and Act, a requisition having been made to His Excellency the Honorable Arthur Hamilton Gordon, C. M. G., Lieutenant Governor and Commander-in-Chief of the Province of New Brunswick, on behalf of the

to Act 6, W. 4, c. 36, "for more effectually securing the liberty of the subject by enforcing the execution of writs of *habeas corpus*;" under which the Judge before whom the return was made, was authorized to examine into the truth of the facts set forth in the return, even when that was sufficient, and the Act 19 V., c. 42, "for better securing the liberty of the subject" under which the order in this case had been issued, which gave the Judge enlarged powers, enacting (s. 3) that "upon return to such order, the Judge may proceed to examine into and decide upon the legality of the imprisonment, and make such order, require such

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said United States of America, by James Q. Howard, Consul of the said United States, at the City of Saint John, in the Province of New Brunswick, stating that John C. Braine, H. C. Brooks, David Collins, John Parker Locke, Robert Clifford, Linus Seely, George Robinson, Gilbert Cox, Robert Cox, H. A. Parr and James McKinney, charged upon the oath of Isaac Willett and Daniel Henderson, with having committed the crimes of piracy and murder on the high seas, within the jurisdiction of the said United States of America, on the seventh day of December, inst., are, or some of them are, now in the City of Saint John, within this Province, and requesting that the said John C. Braine, H. C. Brooks, David Collins, John Parker Locke, Robert Clifford, Linus Seely, George Robinson, Gilbert Cox, Robert Cox, H. A. Parr and James McKinney, may be delivered up to justice according to the provisions of the said treaty; such warrant directed to all and every the Justices of the Peace and Officers of Justice within the Province of New Brunswick, and is as follows—[here His Excellency's warrant is inserted]. (See *ante*, p. 211.)

And whereas, on the receipt of the said warrant by me, and acting under and by virtue thereof and in pursuance of the said Act of Parliament, I did examine Isaac Willett under oath touching the truth of the said charges set forth in the said warrant, and upon the evidence of the said Isaac Willett, in pursuance of the said Act of Parliament, I did on the 25th day of December last, issue my warrant, under my hand and seal, for the apprehension of the said persons upon the charges aforesaid, in the words following—[here is inserted warrant of apprehension]. (See *ante*, p. 215.)

And David Collins, James McKinney and Linus Seely, three of the persons in the said warrant, having been found within my jurisdiction, and having been arrested and brought before me, under and by virtue of the said warrant, and I having proceeded to the investigation of the charge of piracy charged against the said named persons so brought before me, and upon the examination of the witnesses under oath touching the offence of piracy charged against the parties so brought before me, and upon the evidence before me under oath, I do hereby, under the Act of the Imperial Parliament, command you, the said Constable or Peace Officers, to convey the said David Collins, James McKinney and Linus Seely, to the common goal of the City and County of Saint John, and deliver each of them to the keeper thereof, upon the charge

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Ritchie, J. I think some facts should be shown on affidavit to authorize my making the order asked for. I have no judicial knowledge of the proceedings before the magistrate.

of piracy, for that they having, on the 7th day of December, in the year of our Lord one thousand eight hundred and sixty-three, on the high seas, about twenty miles north northeast of Cape Cod, in the United States of America, with force and arms, maliciously, wilfully, feloniously and piratically made an assault upon the said Isaac Willett and others, the mariners then on board and in charge and command of the steamboat or vessel named the *Chesapeake*, the said vessel being a vessel belonging to the United States of America, and registered in the United States according to the laws of such States, and belonging to one Henry B. Cromwell, a citizen of the United States of America, and being of the value of sixty thousand dollars of lawful money of New Brunswick, and having on board a cargo of the value of eighty thousand dollars of like lawful money, and the said vessel being then on a voyage from the port of New York, in the United States of America, to the port of Portland, in the said United States of America, and having then and there piratically, feloniously, wilfully and maliciously put the said Isaac Willett and others, the crew of the said vessel, in fear and danger of their lives, on the high seas aforesaid, and having then and there maliciously, wilfully, feloniously and piratically taken possession of the said vessel and the cargo thereof, and with having then and there feloniously stolen and taken the said vessel and cargo, upon the high seas aforesaid, there to remain until delivered, pursuant to the requisition as aforesaid; and you, the said keeper, shall receive and safely keep each of them upon the said charge until delivered pursuant to such requisition as aforesaid.

Given under my hand and seal, at the City of Saint John, in the City and County of Saint John, this twenty-fifth day of February, in the year of our Lord one thousand eight hundred and sixty-four.

(Signed) H. T. GILBERT, *a Justice of the Peace*, [L. S.]
for the City and County of St. John,
and Police Magistrate for said City.

And this is the cause of the detaining the said David Collins, James McKinney and Linus Seely, whose bodies I have ready.

JAMES A. HARDING, *Sheriff of the City*
and County of Saint John.
 26th February, 1864.

Gray, Q. C., referred to the language of the act giving the Judge the power to order the evidence to be brought before him, even if the warrant of commitment were sufficient. The act should have a construction in favor of liberty. There was a distinction between applications before and after indictment. Where an indictment has been found the court cannot go behind it. But on a commitment before indictment, it is otherwise. *People v. Martin* (1).

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Ritchie, J. I have no doubt I may make the order, but do not think I ought to do so until some reasons are brought before me on affidavit. I must presume everything to be correct.

Gray, Q. C., stated he would obtain an affidavit if required; none could however be made before the return to the order was filed, and the only reason for making the present application was to save unnecessary delay. The Police Magistrate had received notice to produce the papers required.

On the 27th February

Gray, Q. C., applied for an order to the Police Magistrate to produce the proceedings and depositions taken in this case, on an affidavit of David Collins, one of the prisoners, stating that they were confined by virtue of a warrant issued by the Police Magistrate of Saint John, on a charge of piracy; that the warrant was founded on certain depositions taken before the said Magistrate, by which it appeared that the offence, if any, was committed on the high seas, and without the jurisdiction of this province and the United States; that no charge had been made or proceedings commenced against any of the prisoners, for piracy or otherwise, in any court of the United States; that they were acting under due authority from the Confederate States of America, and not pirates, but belligerents, acting against the United States, *jure belli*; that no requisition by the proper authorities in the United States had been made to justify the proceeding taken against the prisoners; and also stating that the facts set out in the warrant of commitment were not supported by the evidence adduced.

(1) 1 Parker, Crim. R. 187.

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He cited Archibold's Criminal Practice by Waterman (1);
People v. Martin (2).

Wetmore, Q. C., for the prosecution, objected that this proceeding took place under the Imperial Statute passed to give effect to the Ashburton Treaty and not a *habeas corpus* act.

Ritchie, J. I am proceeding, not under a *habeas corpus*, nor the Imperial Statute referred to, but under an act giving me like powers upon an order issued under the act as in a proceeding upon *habeas corpus*.

I have no doubt this is a proceeding which peculiarly calls for the interposition of the highest tribunals of the land. It is the duty of Her Majesty's Justices to see that the liberty of her subjects is preserved. If the court will interfere in the case of persons committed for trial in this country, *a fortiori* the court will interfere where the parties are to be sent abroad. The only English case I am aware of under the Extradition Statutes is one which arose under that passed to carry out the treaty with France, *ex parte Besset* (3), where the court held that their powers, being statutory, were to have a strict construction. I cannot doubt I have power to review the proceedings before the magistrate, and if there was no ground for those proceedings, or the magistrate has fallen into any error, either in form or substance, and I should be of opinion the parties are illegally imprisoned, to discharge them. I think I should be failing in one of the most important of my duties did I not order not only the warrant, but also, as an affidavit has been made before me that the evidence did not warrant the conclusion the magistrate arrived at, the depositions and proceedings before him to be brought up; and I consider it my duty, in the words of the Act, to "examine into and decide upon the legality of the imprisonment," and, the return being questioned, "to require such verification" as I may deem necessary; and to enable me so to examine and decide, I think I ought to "direct the further returns" asked for to be made.

The depositions being then handed in by Mr. Gilbert, and being read, including the charge contained in the heading of

(1) pp. 220, 2, 3.

(2) 1 Parker's Crim. R. 187.

(3) 6 Q. B. 481.

the depositions, (10) the case was then fully argued before the learned judge on Saturday, the 27th February, and the following Monday, Tuesday and Wednesday.

Gray, Q. C., and C. W. Weldon for the prisoners.

(10) **HEADING OF THE EVIDENCE, ETC., RETURNED BY THE POLICE MAGISTRATE BEFORE THE JUDGE.**

David Collins, James McKinney and Linus Seely stand charged before me, Humphrey T. Gilbert, Esquire, Police Magistrate of the city of Saint John, and one of Her Majesty's Justices of the Peace for the City and County of Saint John, acting under a warrant under the hand and seal of His Excellency the Honorable Arthur Hamilton Gordon, C. M. G., Lieutenant Governor and Commander-in-Chief of the Province of New Brunswick, bearing date the twenty-fourth day of December, in the year of our Lord one thousand eight hundred and sixty-three, and made and issued in pursuance of the Act of the Imperial Parliament, entitled "An Act for giving effect to a treaty between Her Majesty and the United States of America, for the apprehension of certain offenders," such warrant being directed to all and every the Justices of the Peace and Officers of Justice, within the Province of New Brunswick; for that they, the said David Collins, James McKinney and Linus Seely (together with John C. Braine, H. C. Brooks, Robert Clifford, George Robinson, Gilbert Cox, Robert Cox and H. A. Parr, not brought up before me for examination), did on the seventh day of December, in the year of our Lord one thousand eight hundred and sixty-three, upon the high seas, about twenty miles north northeast of Cape Cod, in the said United States of America, and within the jurisdiction of the said United States of America, and the Circuit Courts thereof, then being passengers in and on board a certain passenger and freight steamer called the *Chesapeake*, United States of America register, owned, belonging and appertaining to Henry B. Cromwell, a subject of the said United States of America, whereof Isaac Willett, also a subject thereof, was master, while on a voyage from New York to Portland, in the said United States of America, with force and arms, turned pirates, and the said steam vessel and the apparel and tackle thereof, of the value of sixty thousand dollars of lawful money of the said United States of America, and of the Province of New Brunswick, and a cargo owned by persons unknown, of the value of eighty thousand dollars of like lawful money, then and there being in the said steam vessel, under the care and custody and in the possession of the said Isaac Willett as master of the said steam vessel, then and there, upon the high seas aforesaid, within the jurisdiction aforesaid, about the distance of twenty miles north northeast of Cape Cod aforesaid, with force and arms, from the care, custody and possession of the said Isaac Willett, and against the will of the said Isaac Willett and the crew and mariners assisting the said Isaac Willett in the navigation of the said steam vessel, piratically and feloniously did steal, take and run away with, they, the said David Collins, James McKinney and Linus Seely, being passengers on board of the said steam vessel, and in and on board the same, on the high seas aforesaid, against the laws of the United States of America and the Statutes of the United Kingdom of Great Britain and Ireland.

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The proceedings have taken place under the Imperial Act, 6 & 7, Vic. c. 76 (1), passed to give effect to the Ashburton Treaty. The treaty is entitled "A treaty to settle and define the boundaries, etc., and for the giving up of criminal fugitives from justice in certain cases," and the 10th Article provides for the extradition of persons charged with the commission of the crimes specified, within the jurisdiction of either country, and seeking an asylum, or being found within the territories of the other. But the treaty could give no power in itself to any officers in this province to act in such cases. Their powers must come from the statute, and from it alone.

And since a man who has committed no crime in the country where he is, is entitled to his freedom, and a man who has committed a crime against the laws of that country, is entitled to be tried by its courts; a statute such as this, being in derogation of these common law rights, must be construed strictly. *Ex parte Besset* (2). The statute provides (s. 1) that if requisition shall be made "*by the authority of the said United States,*" for the delivery of any person "*charged*" with an offence committed "*within the jurisdiction of the United States,*" and found within the territories of Her Majesty; the Lieutenant Governor shall signify that *such requisition has been so made*, and require "all Justices of the Peace and *other Magistrates, and officers of Justice within their several jurisdictions,*" to aid in apprehending the persons so accused; and that thereupon "any Justice of the Peace or *other person* having power to commit for trial, persons accused of crimes against the laws of that part of Her Majesty's Dominions in which such supposed offender may be found;" may examine into the charge and commit the accused person to gaol until delivered up, pursuant to the requisition.

Under the provision of this statute, a warrant of commitment should show upon its face.

(1) That a requisition had been made by the authority of the United States.

(1) 2 R. S. N. B. 429.

(2) 6 Q. B. 481.

(2) That the offence was committed within the jurisdiction of the United States, and that must be their exclusive or territorial jurisdiction.

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(3) That the committing magistrate had jurisdiction over the charge.

(4) That the evidence taken before the magistrate, was such as according to the laws of this province, would justify the apprehension and committal of the persons accused if the crime had been committed in this province, and upon such finding the warrant should order the committal.

But the warrant of commitment in this case is defective in the following particulars :

(1) It does not state that the evidence before the magistrate was such as would have been sufficient to justify an apprehension and committal for trial in this province, and thereupon order the committal.

(2) It does not allege the offence charged was committed in the United States, or within its jurisdiction. It simply alleges that Cape Cod is in the United States.

(3) It shews the offence to have been committed on the high seas, twenty miles off Cape Cod, and beyond the territorial jurisdiction of the United States, and directs the prisoners to be detained "until delivered up pursuant to the requisition," etc. Whereas, for an offence committed on the high seas, *per se* the prisoners are justiciable in the courts here, and cannot be delivered up or discharged otherwise than by due course of law here.

(4) It shews on its face that the magistrate who committed was acting simply as a Justice of the Peace, and not as a commissioner or officer under the Imperial Statutes for the trial of crimes and offences committed on the high seas, and the commission for that purpose in force in this province, and therefore it shews that the case was without his jurisdiction, and does not come within the Imperial Act to give effect to the treaty.

(5) It does not allege or shew that any complaint or proceeding had been taken or was pending in the foreign state

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 CHESAPEAKE or that the foreign state had made any application for the rendition of the prisoners under the treaty, or that the application was made by the *authority* of the United States.

(6) It should not only shew that the offence charged was committed within the jurisdiction of the United States, but should go further and negative any co-ordinate jurisdiction, which co-ordinate jurisdiction must be inferred from the allegation of the piracy being committed on the high seas.

And two minor objections are :

(7) There is no allegation that the evidence was taken in the presence or hearing of the prisoners.

(8) There is no allegation that the place where the evidence was taken was within the City and County of Saint John.

The warrant does not set forth the grounds of the commitment. A mere averment that it was issued "upon due proof as by the statute required" is insufficient. *Nash's case* (1). And so of the averment in the present case "upon the evidence before me taken on oath." And the form of warrant given *in re Kaine* (2), and the terms of the Canadian Act (3) passed to give effect to the Extradition Treaty, are to the same effect. It is perfectly consistent with the terms of the warrant in this case that there was no evidence sufficient to justify the commitment by the laws of this province. A particular kind of evidence is required by the statute. And where a person is committed on a special authority, the commitment must be special and follow the authority. Here there is nothing to shew the nature of the evidence or that there was any sufficient evidence at all. *Ex parte Anderson* (4).

The warrant shows no proper jurisdiction of the United States over the offence. It alleges the parties were charged with having "on the high seas twenty miles N. N. E. of Cape Cod, in the United States of America, with force and arms," etc. And the jurisdiction is sought to be inferred from the *Chesapeake* being a registered United States vessel,

(1) 4 B. & Ald. 295.

(2) 14 Howard 107.

(3) Consol. Stats. Canada, c. 89.

(4) 3 E. & B. 487; 7 Jur. N. S. 122.

owned by a United States citizen. And even then there is nothing in the warrant to show Captain Willett was legally in charge of the vessel. Nor can the exclusive jurisdiction be inferred from the *Chesapeake* being a United States vessel. The jurisdiction of every nation extends "to the punishment of piracy and other offences against the law of nations, by whomsoever and *wheresoever* committed." Lawrence's (Wheaton's) Int. law (1). A pirate is of no country and liable to be tried wherever he may be found, and wherever he may be arrested that country takes jurisdiction of his crime. *U. S. v. Palmer* (2); *in re Kaine* (3).

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The warrant should show on its face that the magistrate had jurisdiction. *Kite and Lane's case* (4); *in re Peerless* (5). Ordinary Justices of the Peace have no jurisdiction over piracy. The Imperial Act refers to this when it says it shall be lawful for the Lieutenant Governor to require "all Justices of the Peace and *other Magistrates and Officers of Justice within their several jurisdictions*" to aid in apprehending persons charged; and further, that it shall be lawful "for any Justice of the Peace or *other persons* having power to commit for trial," to examine into the truth of the charge alleged. The only authority in this province to try charges of piracy is under the Imperial Statutes 28, Hen. 8, c. 15 and 11 and 12, W. 3, c. 7, and under those statutes a commission has been issued and is in force. And the commission only extends to the persons named in it, and not to all magistrates within the province. Special statutes have given justices power to act in England, 7 Bac. Abr., p. 446. Title Piracy, 7, George IV., c. 38; but there is no such authority to justices here. Justices of the Peace as such have no jurisdiction on the high seas. By the terms of their appointment in this province their jurisdiction is confined to the county for which they are appointed. The governor's warrant could give no jurisdiction. The Canadian statute specially authorizes Justices of the Peace to act in such cases,

(1) 2nd ed. p. 231.

(2) 3 Wheaton 610.

(3) 14 Howard 107.

(4) 1 B. & C. 101.

(5) 1 Q. B. 143.

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but the Imperial Statute does not, but limits the action of the respective officers "within their several jurisdictions."

The Lieutenant Governor is bound to pursue the terms of the act and until a proper requisition is made he cannot issue a legal warrant. But the requisitions of the United States Consul in the present case as shown in the recital in the warrant of commitment are not sufficient. They do not even assert the application to be made "by the authority" but only "on behalf" of the United States, terms entirely different since an application may be made on behalf of another without his knowledge, and such an application would fix him with no liability. It may be adopted or repudiated as the party principal chooses. Nor does it appear that the right to make such requisitions is vested in the American Consul *virtute officii*—nor is any direct authority or instructions to him, or any subsequent ratification of his actions shown—nor if shown, could it cure the defect.

The warrant states the parties were brought up "to answer the complaint of Isaac Willett of the State of New York," and not a complaint made by authority of the United States. That complaint of Willett's was made in this province, and not in the United States. It was made before a magistrate who had no jurisdiction in cases of piracy. If he had power to take such a complaint where was the use of the Lieutenant Governor's warrant at all. The whole proceedings were *coram non judice*.

The requisition should be made by the executive authority. Opinions of the U. S. Attorney General cited in Wheaton's Int. Law (1); *in re Kuine* (2); and the terms of the Canadian Statute are to the same effect. The United States Consul's requisitions refer to no such authority. It is consistent with their terms that he merely applied to have the parties tried here. Nor does it appear that the parties had been legally "charged" in the United States as required by the terms of the statute. The requisitions merely say the parties were "believed to be guilty." The second section of the Imperial Act refers to "the deposi-

(1) pp. 241-2 n.

(2) 14 Howard 107.

tions upon which the original warrant was granted," showing that their existence is necessary. And *in re Kaine* (1) and *Metzger's case* (2) are to the same effect. Here even if the prisoners were taken to the boundary line, for all that appears on the warrant of commitment, there would be no one authorized on the part of the United States to receive them—no warrant issued there on which they could be detained.

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This proceeding, though on its face a mere commitment for trial, is a *quasi* conviction, since the magistrate commits the parties to be handed over to another jurisdiction and deprived of rights they would here enjoy, and the warrant should therefore be construed with the utmost strictness.

But leaving the questions as to the validity of the warrant, and taking up the facts which appeared in evidence, the prisoners are entitled to their discharge on the following grounds:

First. The offence charged is piracy on the high seas. It is therefore cognizable by the proper tribunals of the country, and the parties committed do not come within the Extradition Treaty with the United States:

(1) The jurisdiction which a nation has over its public and private vessels on the high seas, is exclusive only so far as respects offences against its own municipal laws. Piracy and murder on the high seas are punishable by the law of nations wherever the criminal may be found, and no country has exclusive jurisdiction of such offences.

(2) No country can make that piracy which is not piracy by the law of nations in order to give jurisdiction to its own courts over such offences.

(3) The Extradition Treaty between the United States and Great Britain contemplates only a demand and delivery in cases where the crime committed falls exclusively within the jurisdiction of the country demanding, and is not applicable where a co-ordinate jurisdiction to try and punish for the crime committed exists in the country where the person demanded is found. Therefore, if the taking of the *Chesapeake*

(1) 14 Howard 107.

(2) 1 Parker, C. R. 188.

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be piracy under the law of nations, the tribunals of this country can take cognizance of the crime, and the party charged can neither be demanded nor legally given up.

Second. Under the relative positions which the United States and the Confederate States bear to each other—both having been recognized as belligerents by Her Majesty's government—the offence is not piracy at all; the parties committed are in no way punishable, and cannot be surrendered.

(1) It is not piracy, because open war exists between the revolted country of the Confederate States and the United States, and in such case the law of nations does not regard acts of aggression done by the subjects of the revolted country against the persons, property or commerce of the parent country as piracy or murder, and the same immunity is extended to all who aid or are acting with them *bona fide* in the act committed.

(2) The circumstances of the case show conclusively that the parties seizing and taking the *Chesapeake*, in so doing were not acting as pirates *cum animo depredandi aut furandi*, but as belligerents seeking to capture and destroy the property of an enemy, and acting in the name of and on behalf of the revolted country.

(3) It is not even necessary in such cases that the party acting should be commissioned by his government—that is simply a matter between himself and his own government, and affects him so far only as it vests the property captured in the government and not in the captor. It is only necessary to prove two facts—first, the existence of open war; second, that the act done was not for piratical purposes, but in the furtherance of a belligerent object.

(4) Great Britain having recognized the Confederate States as belligerents, the subjects of the Confederate States must be regarded *quoad hoc* as ceasing to be subjects of the United States, and not bound by its municipal laws; so that even though the seizure and taking of the *Chesapeake* might, in a subject of the United States, be piracy, yet it cannot be so in a subject of the Confederate States or those acting with them.

(5) The term piracy used in the treaty must be regarded as used in a sense which would not clash with the law of nations, not as used in the sense created for it by the municipal law of a particular country. Thus the law of nations does not regard acts committed by belligerents as piratical, though the country against which the acts have been committed may have passed a law that those acts are piratical. The word "piracy" as used in the treaty must have reference to acts for which there is no punishment in the country to which the party charged has escaped, but which in that country, if committed there, would nevertheless be considered as piracy; for instance, certain offences in harbors, etc. In the present case, the offence being on the high seas, cannot come within the latter class, and Great Britain having recognized the Confederate States as belligerents, they cannot come within the former.

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(6) Officers and men having no permanent connection with the country, or interest in its cause, are and may be privateers, and cannot be treated as pirates, and fraud may be employed as well as force.

(7) The courts of a neutral government which recognizes the existence of a civil war in another country, cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemies.

Third. The court of a Justice of the Peace has no jurisdiction in cases like the present, and a Justice of the Peace as such, has no power either to investigate or commit :

(1) A Justice of the Peace has no jurisdiction or authority to issue a warrant or hold an investigation, and the Governor can give no such authority.

(2) The warrant issued in this province, must be based upon preliminary proceedings, had before a competent tribunal in the United States, having jurisdiction of the offence, and showing that the criminal acts charged were committed within the territorial jurisdiction of the United States, which proceedings must be forwarded to the Governor of this province, before the Governor can issue his warrant, in order

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THE to give any tribunal or authority in this province, jurisdiction to enquire into the offence.

CHESAPEAKE (3) On the face of the warrant to apprehend the prisoners, it discloses no requisition made by the proper authorities of the United States, by its authority, as required by the treaty, and is therefore invalid.

(4) It does not show that in the United States any complaint has been lodged, or proceeding taken against the parties charged, on which the proceedings in this province can be based, and is therefore on that account invalid.

(5) The warrant to apprehend the prisoners, is defective in combining two crimes which are triable before separate and distinct tribunals.

(6) The authority to a magistrate to act, is limited to such crimes as could be committed in that part of the kingdom in which the magistrate resided; and as the high seas are not a part of Her Majesty's dominions, a Justice of the Peace, in the absence of any specific legislation thereupon, has no jurisdiction or power to act in any matter relating to piracy; the examination and warrant in such cases must be before one of the officers composing the mixed court for the trial of piracy and offences on the high seas, constituted by the Imperial Act.

Fourth. This expedition, starting in a neutral territory, however gross a violation of that neutrality, does not effect the status of parties engaged in that expedition, *quoad* the other belligerents, but only is illegal as regards the neutral country whose laws have been violated.

Fifth. The evidence showing that these prisoners were enlisted in the cause of the Confederate service, under a genuine commission of that State, this neutral court cannot enquire into the validity of that enlistment, except for offences against its own laws.

It has been urged that the *Chesapeake*, being an United States ship, her deck should for all purposes be considered a portion of the United States territory. The Police Magistrate in part based his decision upon this. But the authorities cited,

Wheaton's Int. Law (1); Vattel, Laws of Nations (2), do not bear out the conclusion. The jurisdiction of a nation in such case is exclusive only so far as respects offences against its own municipal laws. Wheaton's Int. Law (3); Dictum of Cockburn, C. J., *Regina v. Heane* (4). The offence charged in the present case is piracy on the high seas; there is no allegation in the warrants of any violation of the municipal laws of the United States. But piracy by the law of nations was never contemplated by the Extradition Treaty or statute. It only contemplates piracy by municipal law. Wheaton's Int. Law (5). It could never have been intended to deprive either of the contracting parties of a jurisdiction it already possessed; the reason of the treaty and statute is plainly that escaping prisoners, not punishable by the laws of one country, should be delivered up to the other; and if this crime can be punished here, that reason is at an end. If the word piracy in the statute is to have a general meaning, France might claim the jurisdiction as well as the United States. There is no necessity for the treaty as regards piracy on the high seas. A party committing such an offence is to be tried within the jurisdiction where he is found. *In re Kaine* (6). And the United States Statutes, as put in evidence, require that pirates should be tried in the first district in which they are taken or found, and give jurisdiction to that district court alone (7). And no legislation on their part could make an offence on the high seas piracy, so as to give their courts exclusive jurisdiction. *U. S. v. Palmer* (8); *The Antelope* (9). Their jurisdiction not being exclusive, in giving up parties triable here we should stultify ourselves. The right to try the offence attaches in the United States only on the parties being found there; the statute only contemplates the rendition of *fugitives* escaping from justice in another country, which these are not.

(1) p. 208.

(2) Book 1, c. 19, sec. 216; Book 2, c. 7, sec. 8.

(3) pp. 735, 208, 9, 256.

(4) 4 B. & S. 947.

(5) p. 240, n. 1.

(6) 14 How. 107.

(7) 3 U. S. Statutes at large, p. 514.

(8) 3 Wheaton 610.

(9) 10 Wheaton 66.

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The acts of the captors of the *Chesapeake*, subsequent to the vessel's capture, cannot render their act piracy. Belligerents have no rights; their vessels and goods, when captured by an enemy, may be disposed of as he pleases. Wheaton's Int. Law (1); *Jecker v. Montgomery* (2).

The treaty did not contemplate civil war. In the present case, the parties claimed to capture vessels for the Confederate States. They had the color of a commission. If a *bona fide* commission it was sufficient to protect them. A belligerent may enlist men in a neutral country; though amenable to its municipal laws for doing so. The offence is only cognizable by the neutral state. An officer may be shown by his acts as well as by his commission. Here Parker was recognized in the British harbor of Nassau, as having a letter of marque. A person having a letter of marque implies his having men, and he has a right to send his officers and men out to act on separate expeditions. The evidence shows a *bona fide* enlistment in the Confederate service. A person may obtain the rights of a citizen of a foreign country without naturalization. *Marryat v. Wilson* (3); *The Santissima Trinidad* (4). In this case Captain Parker had been for twenty years a resident in the Southern States. Any private citizen of a belligerent, has a right to destroy the enemy's property wherever found. A commission from the belligerent government is unnecessary. Kent's Coms. (5); Wheaton's Int. Law (6). The only effect of the want of a commission, is that a prize goes to the government and not to the captor. As between belligerents, any man fighting on one side is the enemy of the other. But the genuineness of the commission in the present case is undoubted. The right of Captain Parker to hold it, is alone questioned. But a commission does not follow the ship. It goes to the commander.

There is no evidence of any legal proceedings before any United States tribunal. No warrant appears to have issued in the demanding country, as was the case in *ex parte*

(1) pp. 629, 659, 669.

(2) 13 How. 512.

(3) 1 B. & P. 444.

(4) 7 Wheaton 283.

(5) pp. 106, 7, 8.

(6) pp. 252, 627.

Besset (1), and *in re Kaine* (2). Nor can the application be made by the consul *virtute officii*. In the United States the necessity for the prior action of the executive is done away with by their statute, but here it is otherwise. And the Consul's application was only supported by a deposition not clearly charging piracy and sworn before a magistrate who in a case of piracy had no authority to take depositions at all. The proceedings must be construed *strictissimi juris*, and the warrant, etc., cannot be corrected by the depositions. *Ex parte Besset* (3); *Christie v. Unwin* (4).

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An expedition organized in a neutral country is only illegal so far as the neutral country is concerned. The legitimacy of the use of mercenary troops has always been recognized. A familiar instance is that of Sir DeLacy Evans and the Spanish contingent. The only party to complain is the neutral, whose territory or subjects are employed.

The evidence shows clearly an enlistment. However gross an infraction of neutrality, that enlistment is only punishable by our own laws. The United States cannot complain. Had Parker been at Nassau without authority he would have been taken and punished. His commission was duly transferred from Power, the *Retribution's* first captain. The witness (Colcock's) signature being official must be presumed correct. The commission was shown by Parker as his authority, and the men enlisted under him in the service of the Confederate States, for the purpose of waging war against the United States.

[*Ritchie, J.* Assuming as you must do at this stage of your argument, the correctness of the proceedings against the prisoners, and the magistrate's jurisdiction of the offence; do not these questions fall within the province of the Superior Court on the trial of the prisoner? Is it not the magistrate's duty now merely to see if a preliminary case is made out? I think we must act in this case just as if it was an offence committed here. The question is, would I on the evidence commit for trial in this country. If so, must I not commit the parties for extradition?]

(1) 6 Q. B. 481.

(2) 14 How. 107.

(3) 6 Q. B. 481.

(4) 11 Ad. & E. 373.

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 CHESAPEAKE In Anderson's case a *prima facie* case was made out, but the prisoner was discharged. And so in *U. S. v. Palmer* (1). Parker is found in command of the *Retribution*, and Braine and Parr acting under him.

[*Ritchie, J.* I think these questions are proper for a jury and not for the magistrate. His duty is simply to deal with this case as a magistrate would deal with an offence to be tried in this country.]

The parties were only making war on the United States. They took the vessel on the part of the Confederate States. The organization was under the color of a Confederate commission and that was sufficient.

But if all other points fail, the heading placed by the Police Magistrate to the depositions is sufficient to discharge the prisoners. He says the prisoners were charged with having committed piracy "within the jurisdiction of the United States and the Circuit Courts thereof, and against the laws of the United States, and the Statutes of the United Kingdom of Great Britain and Ireland." But by the United States Statutes put in evidence, it is clear that those courts have no jurisdiction until the prisoner is found within their districts, and there is no evidence in this case of any such jurisdiction attaching at all. The United States by their Acts of Congress recognize that the high seas are not within that jurisdiction. Besides, the evidence varies from the Lieutenant Governor's warrant, which gives no authority to inquire into offences committed within the jurisdiction of the Circuit Courts of the United States, and against the Statutes of the United Kingdom of Great Britain and Ireland. The allegations put in by the magistrate, were not read to the prisoners—were not charged at first. They arose out of the evidence and on the argument before the magistrate. There is nothing in the original warrant and proceedings to support the investigation of such a charge; and unless the evidence was taken under those warrants and proceedings, it was not rightly taken at all.

Wetmore, Q. C., and *W. H. Tuck*, for the prosecution.

Admitting the first deposition of Willett's before the Police Magistrate to have been taken without jurisdiction and *coram non judice*, the United States Consul's letter containing the statement of the offence, and names of the parties, and professing to be made by authority of the executive department of the United States government, is in itself sufficient. The only person to judge of the validity of the requisition is the Lieutenant Governor. If a requisition is presented to him he must decide, and no inconvenience can arise from this, as the parties are not committed to be given up under the governor's warrant alone. It merely authorizes an investigation. The statute does not require the requisition to be in writing. A verbal one would be sufficient.

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The governor's warrant recites the treaty, and, although it states that requisition had been made *on behalf of* the United States, it says also that it was made "in pursuance of the treaty;" the words "on behalf of" were unnecessary. They are mere surplusage. The warrant would be sufficient if they were left out.

With regard to the magistrate's jurisdiction in cases of piracy, the words of the Imperial Statutes are cumulative. Where it says "it shall be lawful for any Justice of the Peace or other person having power to commit for trial," to examine into the charge, etc., it is intended that any of these persons may act in the investigation of any of the offences referred to. The magistrate, under the statute, is to examine into the charge, and this, whatever it is, and wherever he may do it, it will be equally valid. It is not necessary that it should be in presence of the party. The statute authorizes the examination into the offence, even before the warrant for the apprehension of the criminal is issued.

Under the construction of the act, the magistrate must first issue his warrant to apprehend, and then by warrant commit the offender. No evidence subsequent to the issuing of the warrant is required. The magistrate could, had he seen fit, have committed them on Willett's depositions alone.

The second section of the statute, which enacts that "copies of the depositions upon which the original warrant was granted, certified under the hand of the person or per-

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sons issuing such warrant, and attested upon oath, may be received in evidence," does not render a preliminary proceeding in the demanding country necessary in all cases. The words are merely permissive. They legalize the use of such depositions if taken in the demanding country—do not render it necessary to take them. The parties were duly "charged" within the terms of the statute by the United States Consul's requisition. The word "charged" in the statute does not mean any specific charge or particular form of charge. Suppose the case of proceedings before a justice on an accusation of murder; but it appeared on investigation that the crime had been committed beyond his jurisdiction, and in the United States. There the party would be "charged" by the depositions before the justice. And in this view the parties were "charged" by Willett's first deposition. In the form of warrant given in *Bessel's case* (1), the word used is not "charged;" but "accused."

The statute does not confine the rendition to *fugitives* from the jurisdiction of the demanding country. The words of the treaty recited in the statute expressly extend to all criminals who "should be found" as well as those who "should seek an asylum" within the territories of the other nation.

As to this crime having been committed on the high seas and our courts having jurisdiction over it, there can be no doubt that the courts of the United States have a co-ordinate jurisdiction. Having made a requisition, then they are entitled to have the criminals given up. The United States vessel was United States territory, and the United States had full jurisdiction over her. Kent's Com. Ed. 1832 (2); Wheaton Int. Law (3); *Regina v. Heane* (4); *The Flowery Land* (5). The *Chesapeake* had an United States register and carried the United States flag.

There is nothing in the statute to limit the word "piracy" to municipal piracy. If it does not mean piracy by international law it means nothing at all, and if it intends only

(1) 6 Q. B. 481.

(2) Vol. 1, pp. 184, 6, 7.

(3) pp. 208, 9.

(4) *Times*, Feb. 1, 1864; s. c. 4 B. & S. 947.

(5) *London Morning Post*, Feb. 5, '64

what would be piracy by the municipal law of the United States and not here, for such an offence the parties could not be given up at all. There must be a similarity in the laws of the two countries as to the offence.

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The question of the parties holding a valid commission from the Confederate States would clearly be a matter for consideration at their final trial, and not at this preliminary stage of the proceedings. It is a question for a jury. There was no real proof of Colcock's signature to the transfer from Power to Parker.

No greater particularity can be required in the warrant of commitment in the present case than in any proceeding in our own courts. This is a preliminary proceeding, and no such great particularity is therefore required. Besides, the proceedings may be amended. The English decisions cited on this point by the prisoners' counsel do not apply. The Act under which the order was granted in this case differs from the *habeas corpus* statutes, and enables the judge to "make such order as he may deem necessary." The magistrate's heading of the evidence is immaterial. It cannot create any variance between the Lieutenant Governor's warrant and the proceedings taken under it, or invalidate the proceedings if otherwise correct.

Gray, Q. C., in reply. The alteration in the heading of the evidence is very important. It saps the very foundations of justice. If a requisition is made and a warrant issued, and the magistrate takes evidence on a different charge, it is a serious matter. The alteration has a suspicious appearance, and was made to cover an objection raised at the trial. It has a material bearing on the case. If the evidence does not correspond with the Lieutenant Governor's warrant, what evidence is there to show the parties are guilty at all. In that case the parties are in jail under a commitment not supported by the evidence. If there is no evidence, the commitment is irregular and illegal. If there is evidence, it does not support the charge, and the proceedings cannot be amended by the evidence. *Christie v. Unwin* (1).

(1) 11 Ad. & El. 373.

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As to the sufficiency of the requisition, the effect of the argument of the counsel for the prosecution would be that a warrant for the arrest of any person, claimed to have committed an offence in the United States, could be issued without any sworn depositions at all. And the evidence negatives the inference drawn from the warrant reciting it was issued "in pursuance of the treaty." Surely any person calling himself an United States Consul cannot, by merely writing a letter to the Lieutenant Governor, have a warrant issued calling on all magistrates to arrest any number of Her Majesty's subjects the consul may choose to name.

And under the Imperial Statute the Lieutenant Governor's warrant could not authorize the magistrate to take Willett's second deposition. It could only authorize magistrates to act "within their several jurisdictions." The United States can only be entitled to jurisdiction over piracy on the high seas when the pirates are found within their jurisdiction. If found here we have jurisdiction, and our courts must use it. There is nothing to show that this particular case is, in the opinion of the United States government or courts, within their jurisdiction. Had proceedings first been taken there it would have been otherwise. There is now no United States officer authorized to receive the prisoners on their being taken to the boundary. The original warrant is bad as combining two distinct offences—murder and piracy.

The learned judge, having taken time to consider, on the 10th March, 1864, delivered the following

JUDGMENT.

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| <i>In re</i> DAVID COLLINS, JAMES McKINNEY, and LINUS SEELY, | } | Prisoners confined in the Common Gaol of the City and County of Saint John. |
|---|---|---|

RITCHIE, J. (1) This was an application made to me on behalf of the above named prisoners, under the Act of Assembly 19 Vic. cap. 42, entitled "An Act for better securing the liberty of the subject;" and sufficient cause

(1) Afterwards Sir William J. Ritchie, Chief Justice of the Supreme Court of Canada.—ED.

having been shown to me, I did, by order in writing, require and direct the keeper of the jail of the City and County of Saint John to return to me whether or no the said parties were detained in prison, together with the day and cause of their having been taken and detained; to which order the Sheriff of the City and County of Saint John, the keeper of the said jail, returned to me that the said parties were confined in the said jail under a warrant from Humphrey T. Gilbert, Police Magistrate and Justice of the Peace for the City and County of Saint John, from the following dates: McKinney from the 26th day of December last past; Collins from the 27th of December; and Seely from the 1st day of January last past; except when ordered for examination by the said magistrate, up to 11 o'clock or thereabouts of the morning of the 24th February, then instant, when they were taken to the office of the said magistrate; that the said Collins, McKinney and Seely were committed to the said jail at mid-day on the 25th day of February, then instant, with a warrant or commitment, which the said sheriff sets out *verbatim*; and this he returns is the cause of the detaining of the said parties whose bodies he says he has ready.

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The warrant or commitment set forth is under the hand and seal of Humphrey T. Gilbert, Esquire, a Justice of the Peace of the City and County of Saint John, and Police Magistrate for the City of Saint John, and dated 25th February, 1864 (5).

On this return being made to me at the time appointed for the hearing of this matter, on application made on behalf of the said prisoners on the affidavit of David Collins, I did, in pursuance of the power and authority in me vested by the Act of Assembly, 19th Vic., chap. 42, require and direct a return to be made to me of all the proceedings, examinations, orders, and depositions taken before H. T. Gilbert, P. M. and J. P., etc., under and by virtue of a warrant purporting to be issued by His Excellency the Lieutenant Governor, dated the 24th December, 1863, the same being deemed by me necessary and proper for the purposes of

(5) See *ante*, p. 215.

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The depositions transmitted with one of these letters professed to have been sworn before "H. T. Gilbert, Police Magistrate of the City of Saint John," on the 22nd December, 1863, the *jurat* does not say where. The depositions are headed "Province of New Brunswick, City and County of Saint John, to wit," and commence "Isaac Willett, of the City of New York, in the State of New York, United States of America, captain of the steamer *Chesapeake*, belonging to the United States of America, and Daniel Henderson, of the City of Portland, in the State of Maine, one of the United States, second mate of the said steamer," and then detail, so far as within their own knowledge or what they heard on board, the circumstances of the capture by certain passengers (fifteen in all), of whom the names of Braine, Collins, Robinson and Parr are given, the names of the others being unknown to them, of the steamer *Chesapeake*, when she was about twenty miles North North East of Cape Cod, the shooting of the engineer, wounding of the mate and second engineer, and the forcible taking possession

(1) See *ante*, p. 208.

of the vessel, and the sending on shore in New Brunswick of the captain and all the crew except the first and third engineers and three firemen, who were retained on board; and the deponents state that they are informed and fully believe that J. C. Braine, H. C. Brooks, David Collins, John Parker Locke, *alias* John Parker, Linus Seely, George Robinson, Galbraith Cox, Robert Cox, James McKinney, Robert Clifford and H. A. Parr were, among others, the captors of the said steamer *Chesapeake*, a steamer of the said United States of America, on her passage from New York to Portland, and that these persons, being passengers on board, took forcible possession of the said steamer against their will and that of the other officers and crew of the said steamer. But except detailing the facts above referred to, no charge of piracy or murder is made, and no allegation whatever of the acts having been committed within the jurisdiction of the United States (1).

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The prisoners by their counsel claim that their detention is illegal, and a great variety of objections were urged at length to the proceedings in this case. They are all, I think, covered by the following:

First. That there was no legal charge against the prisoners in the United States or in this Province of an offence mentioned in the statute committed within the jurisdiction of the United States, nor any proper requisition by the authority of the United States for the rendition of the prisoners, and therefore the Governor had no authority under the treaty and statute to issue his warrant.

Secondly. That if he had, Mr. Gilbert had not, either as Police Magistrate for the City of Saint John, or as a Justice of the Peace for the City and County of Saint John, any authority to examine touching the truth of the charge of piracy alleged in the warrant, or to commit the persons accused thereof.

Thirdly. That if Mr. Gilbert had jurisdiction, the evidence before him showed that the offence was not piracy, and the

(1) See *ante*, p. 248, for charge, touching which the witnesses were examined by Mr. Gilbert.

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prisoners were not guilty of that crime, and consequently there was no evidence of the truth of the charge, but to the contrary.

Fourthly. That if he was not wrong in this he wrongfully took a fresh complaint, and wrongfully examined on charges contained in that complaint, and not on the charge in the Governor's warrant, and that the warrant he issued and under which the prisoners are now detained is bad on its face, and not sufficient in law to justify their detention.

The Queen has a right to know why any of her subjects, or persons in her dominions, who are alleged to be wrongfully imprisoned are so restrained of their liberty. The writ of *habeas corpus* at common law and by statute, and the statute of the general assembly under which I am now acting, are the constitutional means in this province by which all alleged improper imprisonments are inquired into, and Her Majesty's Supreme Court and the judges of that court are bound on proper cause shown to investigate all cases of alleged unlawful arrest, and to relieve therefrom if shown to be contrary to law. The right to grant such relief in this case has not been, and cannot be questioned. Having, then, all the proceedings before me, I have to ascertain and determine whether or not such proceedings are justified by and in conformity with the Treaty and Act of Parliament. If they are, this application must be dismissed. If they are not, the prisoners must be discharged.

The treaty, under which the delivery up to the United States Government of the prisoners is sought, is a treaty ratified on the 13th of October, 1842—"to settle and define the boundaries between the possessions of Her Britannic Majesty in North America and the Territories of the United States"—for the "final suppression of the African slave trade, and for giving up criminals, fugitives from justice, in certain cases." The recital of it having reference to that portion which bears on the present case is: "Whereas it is found expedient for the better administration of justice and the prevention of crime within the territories and jurisdiction of the two parties respectively that persons committing

the crimes as hereinafter enumerated, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up." And Article X. contains the stipulation agreed on (2).

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To enable this treaty to be carried out in the British dominions a statutory enactment was necessary, and the parliament of Great Britain, in the 6th and 7th year of Her Majesty's reign, passed an act for giving effect to the treaty, which, after reciting the 10th article of the treaty, and the 11th with reference to the duration of this portion of it, after reciting that it is expedient that provision should be made for carrying the said agreement into effect, enacts as follows (3):

The authority which this statute gives the officer administering the government of any colony, and all justices of the peace and other magistrates and officers of justice within their several jurisdictions, to act, being a statutory power, they must one and all act strictly in accordance with the authority given, and rigidly pursue that authority. Bearing this in mind, I proceed to the consideration of the first objection. We must look closely to the Act of Parliament, for it is from that, and that alone, the authority to act proceeds, and the very first words of the enacting part of the statute show that the basis of this right is on an event: "In case requisition shall at any time be made by the authority of the United States in pursuance of and according to the said treaty for the delivery of any person charged with certain crimes (including piracy) committed within the jurisdiction of the United States," etc. Thus we see the requisition is not to be a simple bald request for the delivery up of the person named, but it is a requisition which must be by the authority of the United States—it must be in pursuance of and in accordance with the treaty—it must be for the delivery of a person charged with one of the offences mentioned in the treaty, and the offence with which he is charged must have been committed within the jurisdiction of the United States. If a case perfect in all these

(2) See *ante*, p. 209.

(3) See *ante*, p. 210.

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ingredients is presented, the statute says it shall be lawful for the administrator of the government of any colony or possession by a warrant under his hand and seal, to signify that such a requisition has been made. Deficient in any one of these statutory requirements the governor is powerless to act.

Let us, therefore, examine the documents upon which His Excellency issued his warrant in this case. They all bear date on the same day, and in the absence of any evidence to the contrary, I may assume were laid before His Excellency at the same time, but the letter signed J. Q. Howard, United States Consul, in which the prisoners are named, would appear to have been the first written. It is a communication addressed to the Lieutenant Governor through the Provincial Secretary. The first part of this letter is simply a request that the governor will use his authority under the act of parliament "to the end that certain offenders (not naming them or their crime, or the place or jurisdiction within which committed) may be apprehended and delivered up to justice" (not stating to whom). It then proceeds to desire the Secretary to make known to His Excellency, that as an officer of the United States Government the writer is authorized by the executive department of that government to make a requisition upon him as the officer administering the government of this province, in order that certain persons (not naming them) believed (not charged) to be guilty of the crime of piracy (not stating within what jurisdiction committed, and not stating whether piracy against the law of nations or piracy against the municipal laws of any particular country) may be brought before the proper officers of justice, so that the evidence of their guilt or innocence may be heard and considered; and then he requests that, in accordance with the provisions of the said act of parliament, His Excellency will by warrant signify that a requisition has been made for the apprehension of John C. Braine and others, including the prisoners, and require that all justices of the peace and other magistrates within the jurisdiction of this province shall aid in apprehending the above named persons accused (not

charged) of the crime of piracy, for the purpose not of having them delivered up, but for the purpose of having them brought to trial. Under the statute we have seen the requisition must be made "by the authority of the United States," that is of the government of the United States. Had Mr. Howard been a public minister of the United States, and so the representative of that government, a requisition by him would doubtless have been good; but I am not aware that as consul he had any such authority unless specially delegated. Perhaps the fair construction of that letter would be that Mr. Howard intended to convey to the governor that he was so specially authorized, but the authority he claims is simply "in order that certain persons believed to be guilty of the crime of piracy may be brought before the proper officers of justice, so that the evidence of their guilt or innocence may be heard and considered." This is all that he puts forward as to the extent of his authority, and upon this, without production of the authority, he proceeds to request that His Excellency will by warrant signify as before stated. No authority from the government of the United States is shown or directly alleged authorizing him to ask for the apprehension of the individual parties he names, or to ask for their apprehension as charged with the crime committed within the jurisdiction of the United States, but simply of parties accused of the crime of piracy, for the purpose not of being delivered up under the treaty, but for the purpose of having them brought to trial. Had His Excellency issued such a warrant as is here asked for, I have no hesitation in saying, for the reasons that will hereafter be given in considering another branch of this case, it would have been bad. Is the matter then helped by the second letter? By this letter the consul transmits affidavits of the captain and second mate, sworn at St. John before H. T. Gilbert, police magistrate, on no charge or complaint, to be presented to His Excellency in case "he requires evidence of the criminality of the persons charged with the crime of piracy before issuing the warrant for having them brought to trial." A sincere hope is then expressed that no obstacle will be thrown in the way of

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bringing those charged with so grave an offence to justice. If there are deficiencies in the first, it can hardly be urged that they are supplied by this letter or by the depositions accompanying it. His Excellency being one of the commissioners named in the Royal Commission for taking information and apprehending and committing for trial persons charged with offences on the high seas, and if brought to trial, one of the judges to try them, this letter, instead of being a requisition under the statute, or in aid of a requisition, if I may use the expression, more resembles an application to His Excellency in that capacity than to him under the 6th & 7th Vic., as an officer administering the government, more particularly as the last paragraph says: "We had believed until this late hour that a requisition before the executive would not have been required in the first instance," which would rather corroborate the view that proceedings were desired, independent of a requisition. As to the depositions, in my opinion, it cannot make the requisition good if not good without it.

It appears to have been sworn before Mr. Gilbert as police magistrate, and was, I think, on his part wholly extra-judicial. No complaint or information appears to have been laid before him to justify his taking the deposition, and if the charge of piracy, which the statements in it unanswered would justify, had been made at that time before him, he had no jurisdiction to entertain it; still less had he jurisdiction if the offence was an alleged crime committed within the jurisdiction of the United States, and therefore amounted to no legal charge, and to no legal evidence of the crime of piracy; but is it not absolutely necessary that the parties should be charged with the commission within the jurisdiction of the United States of one of the crimes mentioned, that is legally charged judicially, or by public process, or in some manner warranted by the laws of the country in which the alleged offence was committed. I think the words of the statute too clear to admit of any reasonable doubt on this point; and the 2nd section of the Act confirms me in this view. This section contemplates it being done by the issuing of a warrant, for in providing that certain evidence

may be used by the magistrate or officer in the investigation of the criminality of the person apprehended, it says, "copies of the depositions upon which the original warrant was granted," etc. This obviously refers to the original warrant granted in the country where the crime was committed, and anterior to the requisition; and this view would seem to be entertained by jurists of the highest celebrity in the United States, for in the judgment of Nelson, J., in the Supreme Court of the United States, in *Kaine's case* (1), he says: "This species of evidence is very differently guarded in the Act of Parliament, 6 & 7 Vic. There, copies of the depositions laid before the government, and upon which the proper officer issued his warrant to the magistrates authorizing them to institute proceedings to arrest and commit the fugitive, are those only permitted to be given in evidence; in other words, copies of the depositions upon which the government acted in the matter are admissible as evidence of criminality. The original of these are those upon which our government make the requisition, and of course the good faith of the nation is pledged that they are taken before competent officers, and that the facts stated are true." And Chief Justice Taney concurring, as he said he did, in all that Nelson, J., then said, contented himself with expressing his entire assent to the opinion Nelson, J., had then just delivered; and Daniel, J., concurred in all that Nelson, J., said. And that this principle has been acted on will be seen by reference to *Bisset's case* (2), in England, where we find a warrant was issued first in France, and to *Kaine's* in the United States, just referred to, where a warrant was issued in Ireland, in addition to the special authority and affidavit of the consul. In *Kaine's case* (3), Mr. Barclay, the British Consul, was specially employed, the report says, by direct authority of the British Minister, accredited to the Government of the United States, and in pursuance of this authority Mr. Barclay made the necessary affidavit; and no case has been cited to me, nor am I aware of any, where a different practice has been adopted. On

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(1) 14 Howard 107.

(2) 6 Ad. & E.

(3) 14 Howard 107.

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the contrary, I find in a note to the last edition by Lawrence of Wheaton's International Law this view confirmed by the opinion of Mr. Cushing, May 21st, 1854, in the published opinions of the Attorneys General of the United States, volume 6, page 485. The practice is declared by him in these words :

"The practice of our own government, as well as that of Great Britain, requires that all claims of extradition should be founded on a judicial warrant, with proper evidence to justify the warrant. The United States will not, therefore, make a demand on Great Britain for a person alleged to be a fugitive from the justice of one of the United States without the exhibition of a judicial warrant issued on sufficient proof by the local authority." And again, in an opinion by the same learned gentleman, Nov. 2, 1854, published in the same work, vol. 7, page 6, he says: "A mere notification from a foreign legation that a party guilty of a crime has escaped, and perhaps fled to the United States of America, is not sufficient to justify the preliminary action of the President. The general rule is, the government of which extradition, whether by comity only (citing Kluber, sec. 66, Martin's Precise, sec. 101), or by treaty, is demanded, before it is called on to act, must have reasonable *prima facie* evidence of the guilt of the party submitted to it, as well as the demand of the executive authority." And again, vol. 8, page 215, in another opinion of the same, he says: "But to justify the commencement of proceeding in extradition it must appear that the criminal acts charged were committed within the territorial jurisdiction of the demanding government."

But suppose the documents contain a charge against these prisoners, where do we find it alleged in them that the offence charged was committed within the jurisdiction of the United States of America? The crime stated is piracy. In its primary and general signification this indicates an offence against the law of nations, justiciable wherever the offender may be found. In the codes of different countries it has been arbitrarily adopted as a term applicable to offences against the municipal laws of such countries, or as

expressed by the commissioners in England in their report on the criminal law : " By statutes passed at various times, and still in force, many artificial offences have been created which are to be deemed to amount to piracy." All such offences would be cognizable only by tribunals having jurisdiction either territorially or over the person of the offender. If it was intended in this case to be used in its limited or artificial sense, should not the requisition have shown it, to enable the governor so to state it in his warrant; otherwise how could the justices or officers, without knowing whether it was such an offence as would be cognizable in our courts, possibly be able to inquire into the sufficiency of the evidence according to the laws of this province? If it was intended to use the term, as I think it must be taken to have been in its general sense, then the question has been raised whether, inasmuch as it was not alleged that any of these parties had been in the United States since the acts on the high seas complained of were committed, but the contrary was admitted on both sides, how can the offence be considered as committed within the jurisdiction of the United States? The object of the treaty is to be found in one of its recitals, which is: " Whereas it is found expedient for the better administration of justice and the prevention of crime within the territories and jurisdiction of the two parties respectively, that persons committing the crimes hereinafter enumerated, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up."

It is well known that the principles of the common law pervade the jurisprudence of both Great Britain and the United States, and by the common law, crimes are unquestionably considered local, cognizable and punishable exclusively in the country where they are committed; and it was doubtless to prevent the failure of justice that would necessarily result from offenders in one country seeking refuge in the other and there being amenable to no punishment, that this treaty was entered into; and it is not difficult to understand how the crime of piracy, in its general sense, might come within the operation of the treaty when a pirate

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having gone into one or other of the countries and so made himself amenable to its courts and had been there legally charged with the offence, had fled or been subsequently found within the territory of the other, that in such a case the country where he was first found might claim jurisdiction over the crime and the person so charged. But I have great difficulty and am as yet unable to arrive at the conclusion that, when the pirate has never, after committing the offence, entered the country of one of the contracting parties, but is found in the territory of the other, the government of the former can assume jurisdiction over the offence and person, and require him to be given up, and so denude the latter country of its clear jurisdiction in the matter.

I cannot, as at present advised, think it was intended by this treaty to raise such a conflict of jurisdiction and authority, but that the word piracy was intended to apply to piracy in its municipal acceptation, or if to piracy against the law of nations then to the exceptional case I have above supposed; but assuming the offence as alleged to be one within the treaty, and the requisition to be sufficient, I proceed to consider the next objection.

Had Mr. Gilbert, either as police magistrate or a justice of the peace, authority to examine touching the truth of the charge?

The terms of the statute are that the warrant of the governor shall "require all justices of the peace and other magistrates and officers of justice within their several jurisdictions to govern themselves accordingly, and to aid in apprehending," etc.; and thereupon "it shall be lawful for any justice of the peace or other persons, having power to commit for trial persons accused of crimes against the laws of that part of Her Majesty's dominions in which such supposed offenders shall be found, to examine upon oath," etc. The words of the statute differ from the treaty. The words of the treaty are, "judges and other magistrates." I am bound to think this alteration advisedly made, and I find it difficult to conceive any other reason than to preserve consistency in the administration of justice. In the treaty nothing is said as to the jurisdiction of the justices and other

magistrates. In the statute the governor can only require justices of the peace and other magistrates and officers of justice to act within their several jurisdictions; beyond their jurisdiction then they cannot act. But the statute says, "it shall be lawful for any justice of the peace or other person having power to commit for trial persons accused of crime," etc.; that is, I am inclined to think, when accused of crimes in the United States over which the officers respectively have jurisdiction to commit if committed in this province. Then in such cases they should examine on oath, and if the evidence would justify their committal here, issue their warrant, etc.; and an insertion of the words "or other persons having power to commit for trial," would seem unnecessary if justices of the peace and other magistrates could act in all cases. As at present advised, I am disposed to read the terms, "in their several jurisdictions," in their broad signification. I think it more consistent with the scope of the statute and the duties to be performed that they should be considered as applying to their judicial as well as their territorial jurisdiction, it being, I think, unreasonable to suppose that a justice of the peace, who cannot receive an information on a charge of piracy, or examine into the truth of such charge if cognizable in this province, should, if committed in the United States, determine on the sufficiency of the evidence according to the laws of this province if the crime was committed here; or, in like manner, that the commissioners authorized solely to receive information and commit for trial in cases of offences on the high seas, should deal with crimes over which, if committed in this province, they have no jurisdiction; and from this construction no possible difficulty can arise, because for every crime named in the statute we have either the justices of the peace or other persons having power to commit for trial; so that in this case, when it appeared by His Excellency's warrant that the crime charged was piracy, Mr. Gilbert, whether as police magistrate or justice of the peace, not having jurisdiction over such an offence, and no power to commit for trial a person charged with piracy, could have referred the matter to the judge of the Court of Vice-Admiralty, or some other

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one of the commissioners having authority over that offence and power to commit for trial persons charged therewith. To confine the magistrate and officers to their respective jurisdictions is, in my opinion, in no respect to conflict with any clause in the treaty, but in harmony with it, and in furtherance of a proper and discreet execution of its stipulations (1).

But assuming the requisition right, and that the magistrate had jurisdiction, we must consider the third point. The question here raised was argued as if I was sitting in the character of a Court of Review or Error on the decision of the magistrate on the facts proved before him. Such, I think, is not the case. The duty of determining on the sufficiency of the evidence is cast on the magistrate or other officers. He is the person to be satisfied that the evidence justifies the apprehension and committal for trial of the persons accused. The amount and value of that evidence is for his determination. A judge of the Supreme Court might think the evidence of guilt strong and of innocence weak, or *vice versa*, but the law has vested the magistrate with the power of weighing and deciding on the effect of the evidence, and it is the result on his mind that is to determine its sufficiency or insufficiency. It is a judicial discretion with which he is vested, which, I think, is not open to question on *habeas corpus*, and cannot be taken from him and assumed by a judge of the Supreme Court. If it was manifestly apparent that the evidence showed that no offence had been committed or that the party was unquestionably innocent, and therefore there was really no matter

(1) The Imperial Statute 12 & 13 Vic. c. 96, passed in 1849, "to provide for the prosecution and trial, in Her Majesty's colonies, of offences committed within the jurisdiction of the Admiralty," and giving colonial magistrates jurisdiction in such cases, was not cited before the police magistrate, nor brought to His Honor Mr. Justice Ritchie's notice in the argument in this case. It would appear to affect so much of His Honor's decision as relates to the jurisdiction of the police magistrate of Saint John in cases of piracy, without, however, affecting the conclusion finally arrived at; that being based on defects in the requisition and other proceedings, and the construction of the Imperial Statute 6 & 7 Vic. c. 76, as well as the want of jurisdiction in the magistrate. — *Reporter*.

of fact or law to be tried, no matter in which the magistrate could exercise a discretion or judgment, then the case would be very different; but is such the case before us? That the vessel was seized and by force taken from the captain and crew on the high seas is not disputed. Unanswered this is a *prima facie* case of piracy, and the burthen is cast on the accused of justifying this apparently wrongful act. The justification set up is that hostilities were existing between the United States and Confederate States of America, and this seizure was made under a commission from, or by authority and on behalf of the Confederate States, and that therefore it was an act of legitimate warfare and not of a piratical character. This, on the other hand, is denied, and it is alleged that the claim to act under the authority of the Confederate States is mere pretence and color to disguise and cover an illegal depredation. The object of privateering in general is not, as Mr. Kent observes, fame or chivalric warfare, but plunder and profit; but at the present day the rights of private armed vessels and private belligerents cannot be doubted. Unless restrained by treaty stipulations the right to commission private armed vessels is, by the laws of nations, esteemed a legitimate means of destroying the commerce of an enemy, and captures made by private armed vessels of one belligerent, even without a commission, though not in self-defence, are not regarded as piratical either by their own government or by the other belligerent state. It does not, indeed, vest the enemy's property thus seized in the captors, but the seizure would be declared a prize of war to the government of the captors; and it is equally true that neutrals taking commission as privateers and acting on them are likewise free from the imputation of piracy.

They may make themselves amenable for the violation of the laws of their own country, and may denude themselves of the right to claim her protection to shield them from the consequences of their acts, but they cannot be dealt with by the belligerents against whom they are acting as pirates. But as neutrals they stand in a very different position from belligerents. Belligerents, we have seen, may make cap-

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tures without commissions. Neutrals can only protect themselves by commissions from, or by acting under authority of the belligerent government, or on board commissioned vessels, or under duly authorized officers. They cannot, without any commission or authority, fit out in a neutral country a hostile expedition against a power at peace with such country, and, under pretence of acting in the name of, or on the behalf, of a belligerent power, commit acts on the high seas that would, unless protected by belligerent rights, be acts of piracy, and not be held responsible criminally for such acts. And therefore it behooves persons not belligerents, but subjects of a neutral power, engaging in acts of hostility, if they wish to escape the imputation of criminality, to be well assured when they depredate on the shipping of a nation at peace with the one to whom they owe allegiance and in opposition to the municipal laws and neutral policy of their own government, and in direct defiance of the express proclamation of their Sovereign, that they are acting under the authority of a commission which will bear the test of a strict legal scrutiny. In the present case, can it be said that this was made out so clearly and unequivocally that there was nothing for the magistrate to deliberate on—nothing for a superior court or jury to try? Without expressing the slightest opinion of the guilt or innocence of the parties, or the probable result of a trial either before a judicial tribunal in this province or in the United States, it will only be necessary to refer generally to the evidence on behalf of the prisoners to show that the case is by no means so entirely free from doubt or question as their counsel assumed. Instead of showing that they were acting under a regular commission, or were belligerents themselves, or that the expedition proceeded from the Confederate States of America, it appears, so far as there is evidence of the nationality of the parties engaged, that they were British subjects, that the plot to seize the vessel was concocted in this city, that the commission under which they claim to act was not directed to any of the persons engaged in this capture, nor were any of them named in it, nor did it relate in any way to seizure under circumstances such as the

present—that it was a commission dated 27th October, 1862, whereby the vessel *Retribution*, Thomas B. Power, commander, was authorized to act as a private armed vessel for the Confederate States on the high seas against the United States, on the back of which commission is an endorsement dated 21st November, 1862, signed Thomas B. Power, whereby he transfers the command of the schooner *Retribution* to John Parker. The commission is proved by proof of the signature of Jefferson Davis, President of the Confederate States, and of the seal of the Confederate States attached thereto; but the endorsement is proved by the slightest evidence of the hand-writing of the subscribing witness. There is no evidence of who this John Parker was. It was proved that at Nassau a Nova Scotian named Vernon G. Locke, who had been residing for the last twenty years in the United States, and whose family is now living at Fayetteville, was last summer in the month of May at Nassau, in command of the *Retribution*, and that he was there received and recognized as her captain, under the name of John Parker. Whether he was really the John Parker named on the back of the commission, or assumed that name with a view of representing that person was not shown, except as an inference might be drawn from the facts one way or other. This commission was produced at the Lower Cove meetings by Locke *alias* Parker, but there is not a particle of evidence as to the whereabouts of the *Retribution* at that time or since, or that he was then captain of her. In fact the only evidence of her at all was her being at Nassau in May last summer. Whether she was in existence or not, or, if in existence, where she was, or under whose command when this expedition was planned and executed, did not appear; nor was there any evidence to show that any of the parties engaged in the capture had ever been on board the *Retribution*, or in any way connected with her. On the contrary, Braine, who would appear to have been in charge of the capturing party, described himself on board the *Chesapeake*, and was addressed by the title of colonel. Locke *alias* Parker, did not proceed on the expedition (though he boarded her subsequently off Grand Manan and took the

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 CHESAPEAKE command), but addressed an order to "Lieutenant Commanding John Clibbon Braine," requiring him to proceed to New York with 1st Lieutenant H. A. Parr, 2nd Lieutenant David Collins, Sailing Master Tom Sayers, one engineer and crew of twenty-two men; engage passage on board the steamer, using his own discretion as to time and place of capture, to act towards the crew and passengers in accordance with President's instructions, and as circumstances permit, bring his prize to Grand Manan for further orders. This is signed John Parker, captain C. S. privateer *Retribution*. There is no evidence of what these parties were officers, or how or by whom they were appointed, with the exception of David Collins, and he appears to have got his commission of second lieutenant from John Parker. It is in these words:

TO DAVID COLLINS.

Reposing confidence in your zeal and ability, I do hereby authorize and commission you to hold and assume the rank of second lieutenant, and this shall be your authority for any act, under order from me, against the government of the United States, or against the citizens of the United States, or against the property of either, by sea or by land, during the continuance of hostilities now existing. This commission to bear date from the 1st December, A. D. 1863.

(Signed) JOHN PARKER.

Had this commission been from Jefferson Davis it might have been easily understood and possibly free from question; but issued by a British subject to a British subject, in the Queen's dominions, it is certainly a proceeding, to say the least of it, novel in its character and fairly challenging investigation. It is true, evidence was offered of military men attached to the Confederate army, showing that in operations on land officers commissioned to discharge a particular duty had, by the practice of the Confederate service, authority to appoint others under them to act as officers to carry out such duty, and that such was a recognized custom of the service; but the practice pursued by officers unquestionably in the service of the Confederate

States in the field, actually engaged in the war of the hostile territories, is not quite conclusive as to British subjects and British territory. But be all this as it may, can it be deemed that the proceeding, if justifiable, was not, in many of its features, most irregular, and the *prima facie* case before the magistrate being on the one hand clear, and the alleged justification presenting the irregularities and peculiarities it did, and being open to so much question, can the justice be fairly said to have exceeded his discretion if the result at which he arrived decided that the evidence was such as would justify their apprehension and committal for trial had the alleged crime been committed here, leaving the prisoners to substantiate their defence before a competent court, where the legal points could be properly determined, and where the questions of intent, and of fact or inference, would be submitted to and determined by jury. As at present advised, I cannot say that, in this particular, the magistrate arrived at a wrong conclusion, nor do I think the magistrate did wrong in refusing to go behind the governor's warrant and determine on the sufficiency of the requisition to His Excellency. Over that matter, I think, the statute gives the justice no jurisdiction or authority.

Before leaving this branch of the case I cannot refrain from expressing my deep regret that any inhabitants of New Brunswick, being British subjects, should have been seduced from their clear duty to their Sovereign, and have availed themselves of the hospitality of a friendly power by going into its territory and obtaining a passage from one of its ports, on board one of its ships, and by a stratagem, possibly justifiable by the usages of war in a belligerent, have risen against an unarmed crew, peaceably engaged in their lawful calling, and despoiled them of the property under their charge, and that, too, with an amount of violence resulting in the death of one of the crew, which, under the evidence in this case, would not seem to have been necessary for the accomplishment of the end sought to be attained—an example, I may be permitted to add, I earnestly trust will not be followed by any of Her Majesty's loyal subjects in this province.

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As to the fourth objection. The commitment first sets out, as we have seen, the warrant of His Excellency, which alleges the parties to be charged upon the oaths of Isaac Willett and Daniel Henderson, with having committed the crimes of piracy and murder on the high seas within the jurisdiction of the United States of America, on the 7th December, then instant. Now, where are these averments obtained by the legal adviser of the governor, who, I presume, drafted the warrant? Reverting to what has been said as to the requisition, not a word is alleged by the consul of this crime of murder, and not a statement made by him that either piracy or murder had been committed within the jurisdiction of the United States. No doubt, the legal gentleman who drew the warrant felt the difficulty of the want of a distinct charge, and the absolute necessity of the averment that the crime was committed within the United States of America; but as there was neither of these particulars in either of the letters of the consul, he, no doubt from necessity, resorted to the affidavit transmitted therewith of Willett and Henderson, and from the facts stated by them transformed an affidavit intended, as the consul says, "to be presented to His Excellency, in case he requires evidence of the criminality of the persons charged with the crime of piracy before issuing the warrant for having them brought to trial," into a charge by Willett and Henderson of piracy and murder. The valuelessness of this document, either as a charge or verification, I have already shown; but where the allegation that the alleged offences were committed within the jurisdiction of the United States was obtained I am at a loss to conceive, for neither the consul nor Willett nor Henderson say anything about it, unless it was assumed that as there could not be a requisition for an offence unless so committed, the offence alleged must necessarily have been committed within the necessary jurisdiction. Again, this warrant does not allege that the requisition was made by the authority of the United States, but on behalf of the United States, by no means convertible terms, though it is true this allegation is preceded by the averment that in pursuance of and in accordance with the said treaty and act, a requisition has been made, etc.

With these exceptions, the warrant of His Excellency appears to be in strict conformity with the statute. Mr. Gilbert's warrant, then, as we have seen, proceeds to recite that on receipt of this warrant he examined Isaac Willett under oath touching the truth of the charges set forth in said warrant, and upon the evidence of the said Willett, on the 25th of December, issued his warrant for the apprehension of the persons upon the said charges; and on reference to this examination I find it is headed, "The complaint of Isaac Willett, etc., taken and sworn to this 25th day of December, 1863, before me, H. T. Gilbert, etc., acting under a warrant under the hand and seal of the Hon. A. H. Gordon, etc. The said Isaac Willett, being duly sworn, saith," etc. It then details with particularity the circumstances of the capture, and alleges facts not before anywhere stated, namely, the registry of the vessel in the United States of America; that the vessel at the time of capture was on the high seas about twenty miles N. N. E. of Cape Cod, in the United States of America, and it avers a malicious, wilful, felonious and piratical assault on, and putting in bodily fear and danger of their lives, the captain and mariners; and the malicious, felonious and piratical taking possession of the vessel and cargo; and that they did then and there wilfully, maliciously, and feloniously and violently steal, take and carry away the said cargo; and that they did, with a pistol loaded with powder and leaden bullets, shoot and feloniously, maliciously, wilfully and piratically kill and murder one Orin Schaffer, the second engineer; and in the same language and manner shot at and wounded in the right knee one Charles Johnston, chief mate; and in the same language and manner shot and wounded in the chin James Johnson, chief engineer.

Now, with all respect for the police magistrate, I think this was not the proper mode of proceeding under the statute. When he received the governor's warrant, assuming he had jurisdiction to act under it, he should have taken no fresh complaint. He should have embodied nothing in the form of a complaint or charge against the prisoners but what was contained in the warrant of the

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governor; and as this was his sole authority to act, he should have confined himself strictly within its requirements, which was simply in the first instance to aid in apprehending the persons accused, which he should have done by issuing his warrant reciting the governor's warrant, the charge therein contained against the prisoners, the requirement imposed on him thereby, and commanding the apprehension of the persons named therein, and should not have received a new complaint or introduced new charges or new matter against the accused. The correctness of this view will, I think, be confirmed by reference to the Imperial Act 8 & 9 Vic. chap. 120, passed 8th August, 1845, and the forms there given.

Having so examined Isaac Willett, the final commitment recites that upon the evidence of the said Isaac Willet, and in pursuance of the act of assembly, he issued his warrant directing the apprehension of the parties to answer, not the charges in the governor's warrant, but the complaint of Isaac Willett, made on oath, for having, etc., in the words which I before mentioned, to be dealt with according to law, the said complaint having been made and taken, and this warrant having been issued in pursuance of a warrant under the hand and seal of the governor, etc., in which, however, I am constrained to differ from the learned police magistrate, the warrant of the governor not authorizing the taking of such complaint nor the arresting the parties to be dealt with according to law, but in the words of the statute to be delivered up to justice according, etc., and had an application been made to discharge the prisoners while detained under this warrant, I do not see how it could have been successfully resisted, *Bessel's case* (1) being a direct authority against it on one point. That was the first decision under the French Convention Act, 6 & 7 Vic. cap. 75, which is in the same words as the American Treaty Act we are now considering. The warrant of the lord mayor there set out that the constable, etc., should convey and deliver into custody the body of J. B., being charged before him, etc., for that the said J. B. is accused of having committed

(1) 6 Q. B. 481.

in France the crime of fraudulent bankruptcy as appears by the warrant of arrest issued by a competent judge in France and duly authenticated before me, and as also appears by the warrant of one of Her Majesty's principal secretaries of state requiring me to take cognizance of such crime, etc. It then avers proof of the crimes, and the warrant commits the prisoner until he should be discharged by due course of law, which is the effect under this commitment under the words, to be dealt with according to law. But the Court held the warrant bad upon the ground that as the commitment was under a special statutory authority, the terms of the commitment must be special and exactly pursue that authority, acting on and recognizing the authority of *Nash's case* (1), where it is laid down that the true distinction is that when a man is committed for any crime, either at common law or created by act of parliament, for which he is punishable by indictment, then he is to be committed until discharged by due course of law, but when it is in pursuance of a special authority the terms of the commitment must be special and exactly pursue that authority.

The commitment then proceeds to aver that the prisoners having been brought before the justice under the warrant, and he having proceeded to the investigation of the charge of piracy charged against them, and upon examination of the witnesses under oath touching the offence of piracy, and upon the evidence before him, so under oath, he did, under the act of parliament, require and command the said constable to convey the prisoners to the common jail, and deliver each of them to the keeper thereof upon the charge of piracy, for that they having on the 7th day of December, etc., and then proceeds to recapitulate the particulars of the charge in the complaint made before him by Isaac Willett, omitting the felonious, etc., murder and shooting, there to remain till delivered pursuant to the requisition aforesaid. On referring to the examinations themselves, we find the charge on which the examination proceeded was of an offence which it alleges took place on the high seas, about twenty miles N. N. East of Cape Cod, in the United States

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(1) 2 Wm. Bl. 806.

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CHESAPEAKE of America, and within the jurisdiction of the United States of America, and the circuit courts thereof, against the laws of the United States of America, and the statutes of the United Kingdom of Great Britain and Ireland. So we see that at every stage of these proceedings the charge assumes a different phase.

In the first instance the consul simply presents the complaint as that certain persons were believed to be guilty of the crime of piracy. The governor's warrant puts it as a charge of piracy and murder on the high seas, within the jurisdiction of the United States of America, on the complaint of Willet and Henderson. The complaint before the police magistrate is the complaint of Willett alone, and alleges the crimes of piracy and murder in the United States of America, and adds the felonious shooting and wounding of engineer and mate, and felonious stealing of the cargo. And on the examination before Mr. Gilbert there is the addition of the crime being within the jurisdiction of the Circuit Courts of the United States, and being contrary to the laws of the United States of America and the statutes of Great Britain and Ireland. But independent of these discrepancies, which would seem to me difficult to reconcile, or on legal principles to account for, there is, to my mind, a still more substantial objection to this warrant. This is the final commitment of the accused to jail, there to remain until delivered pursuant to the requisition. But after examination of the witnesses, and before the committal, there was something to be done, an all important duty to be discharged, which I cannot discover from the warrant or from any of the proceedings before me, and I can look to nothing else to have been performed, and which, if done, I think should clearly, unequivocally and unambiguously appear on the face of the warrant, which it manifestly does not; and that is, that after hearing and considering the evidence, the justice determined and adjudicated that he deemed the same sufficient according to the laws of this province to justify the apprehension and committal for trial of the prisoners, if the crime had been committed within this province. Without such an adjudication the

warrant of commitment could not issue, and without such an adjudication appearing on the face of it when issued, I think the warrant bad, there being without it a want of jurisdiction shown to issue the warrant, or perhaps rather a want of jurisdiction to sustain it; and this view is confirmed by reference to 8 & 9 Vic, c. 20, before referred to, for even there, where a statutory form is given to be used by the police magistrate of the metropolis, the adjudication is set forth. The form is given thus: "Be it remembered that on, etc., A. B., etc., is brought before me, J. P., etc., and is charged before me for that he, the said A. B., on etc., within the jurisdiction of the United States of America, did (here state the offence); and forasmuch as it has been shewn to me upon such evidence as by law is sufficient to justify the committal to jail of the said A. B. pursuant to an Act passed in the 7th year of the reign of Her Majesty, entitled, etc., that the said A. B. is guilty of the said offence, this is therefore to command, etc." The cases to be found bearing on this point lay down the principle very clearly, some of which I will quote. *In re Peerless* (1). This was a warrant setting forth a conviction—Denman, C. J., says: "The magistrate having no jurisdiction except by the express statutory enactment, the offence is not here described sufficiently to show jurisdiction." Per Littledale, J.: "I do not say that this may not be a good conviction upon which a good warrant might be framed, but I think this warrant clearly bad for not showing jurisdiction. In what way it is that justices have jurisdiction ought to appear by the warrant. I found myself on Lord Tenterden's judgment in *Kite & Lane's case* (2)." And Coleridge, J., says: "By a legal warrant I mean a warrant which upon the face of it shows a right to detain, and that right cannot exist unless there be jurisdiction in the magistrates. To deny that this must appear upon the face of the proceedings is to call in question one of the most important rules of the criminal law." In *Kite & Lane's case* referred to, Abbot, C. J., says: "It is a first principle as to all acts done by magistrates that the jurisdiction should appear on

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(1) 1 Q. B. 152.

(2) 1 B. & C. 101.

1864 the face of their proceedings." And Best, J., says: "It is
 THE a settled principle that penal statutes and such as create
 CHESAPEAKE new jurisdiction shall receive a strict construction." *Nash's*
case (1) was the case of a warrant issued under the 57th
 George III., c. 87, sec. 6, by which Act, in case any person
 found on board a vessel liable to forfeiture under 45 George
 III., c. 121, be fit and able to serve His Majesty in his naval
 service, he shall, upon such proof as by the said Act of the
 45th year aforesaid is required, be committed by such justice
 to prison, to answer such information and abide such judg-
 ment, etc. Abbot, C. J., says:—"This Act of Parliament
 of the 57th year of George III., c. 87, is one highly bene-
 ficial in preventing frauds upon the revenue, but at the same
 time, inasmuch as it trenches very strongly on the liberty of
 the subject, we must take care that its provisions are strictly
 pursued." And again; "these circumstances stated in the
 introductory part of this return seem to me quite sufficient
 to warrant this commitment, and if it had been stated upon
 due proof of the matters before mentioned the prisoner was
 committed, I should have thought it sufficient." And per
 Holroyd, J.: "The power of the magistrate to commit de-
 pends on the proof before him, and the rule is, that where
 a limited authority is given it must be shown to have been
 strictly pursued." And in *Christy v. Unwin*, (2), where the
 validity of an order made by the Lord Chancellor under
 6th George IV., c. 16, sec. 18, was questioned, it was held
 that the order must shew on the face of it whatever was
 necessary to give jurisdiction. And Coleridge, J. says:—
 "We cannot intend for or against the order but must decide
 according to the words. However high the authority may
 be where a statutory power is exercised, the person who acts
 must take care to bring himself within the terms of the
 statute. Whether the order be made by the Lord Chan-
 cellor or by a justice of the peace, the facts which give the
 authority must be stated."

This case is, I believe, the first under the Treaty and Act
 of Parliament that has called for judicial investigation in
 this province, and as points of a novel, certainly of a

(1) 4 B. & Ad. 295.

(2) 11 Ad. & El. 377.

peculiar, and I may say of a delicate, certainly of an important character have been raised, I have endeavored to give the case the most careful consideration, and in view of the possibility of this decision becoming the subject of discussion in other quarters, I have, to prevent misapprehension, felt it right, though at the risk of subjecting myself to the charge of unnecessary prolixity, to place on the face of my judgment, at length, the documents and facts necessary to enable all interested in the matter who have not access to the papers before me, or who may not have heard the arguments, correctly to understand the points raised and the reasons for the conclusion at which I have arrived.

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In the prompt manner in which His Excellency the Lieutenant Governor granted his warrant, and in the determination of the Police Magistrate on the facts of the case, the government of the United States cannot fail, I think, to discern the determination of the Queen's representative and Her subordinate officers faithfully and honorably to carry out the Treaty entered into between the respective Governments of the United States and Great Britain; and the present decision, the result of my own judicial convictions, being, I believe, in conformity with the legal authorities of the United States, individually I might hope it would commend itself to the United States Government; but whomsoever it may please or displease must be to me, judicially, a matter of indifference. The only duty I have to discharge is to my Sovereign, to the people of this province, and to my own conscience. That duty is, faithfully, to the best of my humble abilities, impartially, to declare the law as I believe it to be, wholly regardless of consequences.

This I have honestly endeavored to do, and the result of my judgment is, that for the reasons set forth, the proceedings before me, and the warrant of commitment, returned to me by the sheriff of the city and county of Saint John, do not justify the detention in custody of the prisoners, whose imprisonment I therefore declare illegal; and I do by this my order require the immediate discharge from prison of the said David Collins, James McKinney, and Linus Seely, under the said warrant and commitment; and as it appears

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to me that the sheriff of the city and county of Saint John, the keeper of the jail of the said city and county, acted upon the warrant or commitment of the said H. T. Gilbert, according to the requirements of the same, without malice or evil intent, I do, by virtue of the power conferred on me by the Act of Assembly, exempt the said keeper of the said jail from all civil suits which may be brought against him for or by reason of having acted on the said warrant or commitment.

Prisoners discharged.

The vessel and cargo having been brought to Halifax, N. S., were, by direction of the Administrator of the Provincial Government, placed in the Vice-Admiralty Court for adjudication. *The Queen v. The Chesapeake and Cargo*, 1 Old-right 797.

The prisoner, Linus Seely, was subsequently found within the Province of New Brunswick, arrested, and tried for assault and piracy on the high seas. The following notice, convening the Court to try the case, appeared in the *Royal Gazette* of the Province of date May 24th, 1865:

BY AUTHORITY.

By His Excellency the Honorable Arthur Hamilton Gordon, Lieutenant Governor and Commander-in-Chief of the Province of New Brunswick; the Honorable Sir James Carter, Knight, Chief Justice of the said Province; and the Honorable Robert Parker, one of the Judges of the

Supreme Court of the said Province.

To all whom it may concern :

Know ye, that in pursuance of the power and authority to us given by virtue of Her Majesty's commission or letters patent under the great seal of the United Kingdom of Great Britain and Ireland, bearing date the eighteenth day of May, in the first year of Her Majesty's reign, we have appointed, and do hereby appoint, a session to be holden of the Court constituted by the said commission, pursuant to the several statutes in such case made and provided, for the trial of all treasons, piracies, felonies, robberies, murders, conspiracies, and other offences whatsoever, and the accessories thereto, done and committed upon the sea and within the jurisdiction of the said Court, on Tuesday, the thirtieth day of May next, at the Court House, in the city of Saint John, in the said province, whereof all

persons concerned will take due notice.

Witness our hands this twentieth day of April, in the year of our Lord one thousand eight hundred and sixty-five.

(Sgd.) ARTHUR GORDON.
J. CARTER.
R. PARKER.

The Court, composed of Sir James Carter, C. J., Parker and Ritchie, JJ., met at the city of St. John, N. B., on May 30th, 1865. The charge to the grand jury was delivered by the Chief Justice, and Ritchie, J. (afterwards Sir William J. Ritchie, C. J. of the Supreme Court of Canada) charged the petit jury.

William Jack, Q. C., Advocate General, appeared for the Crown.

John H. Gray, Q. C., and *C. W. Weldon* for the prisoner.

The following is the report of the trial taken from the *St. John Evening Globe* of the dates given below:

May 31. The Grand Jury to-day found a true bill for assault and piracy on the high seas against John C. Braine, David Collins, *et al.* Linus Seely, the only one of the above named parties in custody, was arraigned and pleaded not guilty. He selected Messrs. Gray and Weldon for his counsel.

June 1. The trial of Seely is progressing at the Admiralty Court to-day.

June 2. The counsel addressed the Court to-day for and against Seely, after which Judge Ritchie delivered an able, lucid, impressive, and impartial charge.

June 3. The jury at a late hour last night, and after an absence of ten hours from the Court, returned a verdict of "not guilty," and the prisoner was discharged, the Judge giving him a few words of caution as to his future course. Having heard the principal evidence and the charge of the judge, we think that the verdict of the jury could not well have been different from what it was. On all the points but one the charge was against the prisoner; but that one—and it was the most material one—was in his favor. That point was as to the existence of the *animus furandi* on the part of Seely. The commission under which the principals, Braine and Parr, pretended to act, a commission said to be issued by Jefferson Davis to Thomas Power of the *Retribution*, and purporting to be transferred by him to Parker, was of no avail, because it was not shown who Power was; that he ever existed; that the *Retribution* had ever sailed; or that Power had ever made the transfer, or that he had the power to make it. But it was shown that the principals in this affair, at the meetings which they held here, and at which a commission

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of some kind was read purporting to be issued by Jefferson Davis, pretended to be acting for the Confederacy; that they promised their dupes the protection of that power or whatever it was; that they styled each other Captains, Lieutenants, etc., and generally did such other things as might lead the prisoner and his associates to believe that these men were acting for and were authorized by those States. This then would seem to establish that the prisoner considered himself to be acting as a belligerent; that he did not assist in seizing the vessel solely for his own gain, but as a prize to the Confederate States. In making up their minds, the jury had several collateral circumstances connected with the affair—both before it took place and afterwards—to consider. One of these was as to the sale or disposal of the cargo, or part of it, at Shelburne, N. S., and at Lahave. This would seem to establish that the parties so disposed of the cargo for their own benefit. It was between these circumstances and others of lesser note that the jury had to make their decision. Now, whatever might have been that decision, had Braine or Parr been on their trial—of whose original intention from the outset there can be no doubt whatever—as far as Seely is concerned, the jury,

in giving him the benefit of the doubt that must have existed upon some of their minds, did what was just and right. For although a part of the cargo was unquestionably and indisputably sold or exchanged at the places named, it was done by the principals, and although piracy, as far as these principals were concerned, it was an act over which the subordinates had no control; they got nothing, and expected nothing from it; and these circumstances, with the mode of his enlistment, undoubtedly led to Seely's acquittal. If Braine or Parr were put upon their trial for the same offence, we presume they would have to rely upon a regular commission in justification of their acts. Without a commission their disposal of the property was piracy; for the judge charged that, although the subjects of a power at war may seize the property, public or private, of the enemy, the property so seized is taken for the public good, and is to be delivered up to the public authorities, and must not be held for the private benefit of the captors.

The case of *The Saladin*, referred to in the argument of counsel, *ante*, p. 248, was tried at Halifax, N. S., July 23, 1844. It was a case of mutiny and murder on a voyage from Valparaiso to London with a very valuable cargo of guano, copper

and silver. After the master and some of the crew had been murdered, the instigator of the mutiny—a Captain Fielding—and his son, a lad of fifteen years of age, were thrown overboard, and the vessel was wrecked on the coast of Nova Scotia, not far from Halifax. Fourteen persons were on board when the vessel left Valparaiso; only six survived when the vessel was found on the Nova Scotia coast; the others had been thrown overboard. The court of trial was composed of the Admiral on the station, Sir Charles Adam, Haliburton, C. J., and Halibur-

ton, Bliss and Hill, JJ. There were four counts in the indictment: (1) piracy; (2) taking the property on board of the vessel; (3) mutiny, and piratically taking possession of the ship and money; (4) piratical acts. The prisoners were all found guilty, and four of them were hanged. The other two had been forced to assist in the crime to save their own lives. For a detailed statement of this extraordinary case, including the confession of the prisoners, see *The Gleaner* newspaper of Miramichi, N. B., of dates June 19th, July 27th, and August 3rd, 1844.

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A LIST OF STATUTES RELATING TO ADMIRALTY.

General Statutes Relating to Admiralty.

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| 15 Rich. 2, c. 3, 1391. | Jurisdiction of the Admiral and his Deputy. | Repealed in part by 42 & 43 Vict., c. 59. |
| 2 Will. & Mary, s. 2, c. 2, 1690. | Powers of Admiralty to be executed by Commissioners. | Repealed in part by 22 Geo. 2, c. 33, s. 1. |
| 7 & 8 Geo. 4, c. 65, 1826-7. | To same effect. | Repealed in part by Stat. Law Rev. Act, '73. |
| 18 Geo. 2, c. 20, s. 14, 1744-5. 2 & 3 Will. 4, c. 40, 1831-2. 28 & 29 Vict., c. 124, 1865. 31 & 32 Vict., c. 78, 1868. | Commissioners of Admiralty.—Incorporation and quorum of.—Powers of to act as Justices of the Peace, administer oaths, etc.—Suits by and against | Repealed in part by 28 & 29 Vic. c. 112, s. 1. |
| 2 & 3 Will. 4, c. 40, 1831-2. | Transfer to Commissioners of Admiralty of Civil Department of Navy. | |
| 5 & 6 Will. 4, c. 76, s. 108, 1835 | Municipal Corporation Act, 1835. | |
| | Chartered Admiralty Jurisdiction of Boroughs abolished, Cinque Ports excepted. | |
| 55 Geo. 3, 128 1814-5. | Purchase of land for telegraph stations by Admiralty. | |

Coast Guard Service.

17 & 18 Vict. c. 104, ss. 423, 433, 439, 1854.

18 & 19 Vict. c. 91, s. 20, 1855.

19 & 20 Vict. c. 83, 1856.

County Courts.

31 & 32 Vict. c. 71. County Courts Admiralty
Jurisdiction Acts, 1868.

32 & 33 Vict. c. 51. County Courts Admiralty
Jurisdiction Amendment
Act, 1869.

38 & 39 Vict. c. 50. County Courts Act, 1875.
ss. 10 & 11.

Statutes Relating to Marines.

13 Chas. 2, st. 1, Command.
c. 6, 1661.

10 & 11 Vict. c. 63, Enlistment.
1847.

20 Vict. c. 1, 1857. Enlistment.

25 & 26 Vict. c. 4, Commissions.
1862.

33 & 34 Vict. c. 97, Stamps.
s. 3, sch., 1870.

41 & 42 Vict. c. 11, Reckoning of Service.
s. 64, 1878.

42 & 43 Vict. c. 32, Army Discipline and Regula-
tion (Commencement).

42 & 43 Vict. c. 33, Army Discipline and Regula-
tion.
1879.

43 Vict. c. 9. Army Discipline and Regula-
tion (Annual).

Statutes Relating to Merchant Shipping.

4 Edw. 1, c. 13, 1275-6 (Wreck).

22 & 23 Chas. 2, c. 11, 1670-1 (Delivery up of Ship).

11 Will. 3, c. 7, 1698-9 (Piracy and Desertion).

8 Geo. 1, c. 24, 1721-2 (Wages).

13 Geo. 2, c. 17, 1739-40 (Exemptions from Impressment).

33 Geo. 3, c. 67, 1792-3 (Obstructing Navigation).

VICE-ADMIRALTY REPORTS.

- 1 & 2 Geo. 4, c. 76, 1821 (Salvage, Cinque Ports).
- 4 Geo. 4, c. 80, 1823 (Lascars).
- 6 Geo. 4, c. 87, ss. 18, 19, 1825 (Relief of Shipwrecked Mariners).
- 9 Geo. 4, c. 37, 1828 (Salvage, Cinque Ports).
- 7 Will. 4, & 1 Vict. c. 88, 1837 (Mutiny).
- 3 & 4 Vict. c. 56, 1840 (Register, India).
- 12 & 13 Vict. c. 25, 1849 (Desertion from Portuguese Ship).
- 13 & 14 Vict. c. 24, 1850 (Salvage in Case of Piracy).
- 14 & 15 Vict. c. 102, 1851 (Seamen's Fund).
- 15 & 16 Vict. c. 26, 1852 (Desertion from Foreign Ship).
- 16 & 17 Vict. c. 84, 1852-3 (Passengers).
- 16 & 17 Vict. c. 129, 1852-3 (Pilotage).
- 16 & 17 Vict. c. 131, 1852-3 (Mercantile Marine Fund, Dues, Seamen's Fund).
- 17 & 18 Vict. c. 104, 1854 (Merchant Shipping).
- 17 & 18 Vict. c. 120, 1854 (Merchant Shipping Repeal).
- 18 & 19 Vict. c. 91, 1854-5 (Merchant Shipping).
- 18 & 19 Vict. c. 104, 1854-5 (Passengers, Hong Kong).
- 18 & 19 Vict. c. 111, 1854-5 (Bills of Lading).
- 18 & 19 Vict. c. 119, 1854-5 (Passengers in Emigrant Ships).
- 19 & 20 Vict. c. 41, 1856 (Seamen's Savings Banks).
- 19 & 20 Vict. c. 102, s. 91, 1856 (Liability; Procedure).
- 23 & 24 Vict. c. 126, s. 35, 1860 (Liability; Procedure).
- 24 & 25 Vict. c. 10, 1861 (Admiralty Court, England).
- 24 & 25 Vict. c. 52, 1861 (Passengers, Australasia).
- 24 & 25 Vict. c. 96, ss. 64-66, 1861 (Larceny).
- 24 & 25 Vict. c. 97, s. 49, 1861 (Malicious Injury).
- 24 & 25 Vict. c. 100, ss. 17, 37, 40, 1861 (Assault).
- 25 & 26 Vict. c. 63, 1862 (Merchant Shipping).
- 26 & 27 Vict. c. 51, 1863 (Passengers in Emigrant Ships).
- 27 & 28 Vict. c. 25, ss. 40, 41, 46, 1864 (Convoy, Salvage).
- 27 & 28 Vict. c. 27, 1864 (Chain Cables and Anchors).
- 29 & 30 Vict. c. 109, s. 31, 1866 (Convoy).
- 30 & 31 Vict. c. 114, 1867 (Admiralty Court, Ireland).
- 30 & 31 Vict. c. 124, 1867 (Medicines, etc.)
- 31 & 32 Vict. c. 71, 1867-8 (County Court).
- 31 & 32 Vict. c. 72, 1867-8 (Oaths).
- 31 & 32 Vict. c. 129, 1867-8 (Colonial Ships).

- 32 & 33 Vict. c. 11, 1868–9 (Colonial Ships).
 33 & 34 Vict. c. 95, 1870 (Emigrant Ships).
 34 & 35 Vict. c. 101, 1871 (Chain Cables and Anchors).
 34 & 35 Vict. c. 110, 1871 (Unseaworthy Ships, Collision).
 35 & 36 Vict. c. 19, 1872 (Pacific Islanders).
 35 & 36 Vict. c. 73, 1872 (Emigrant Ships, Registry, etc.)
 36 & 37 Vict. c. 85, 1873 (Merchant Shipping).
 37 & 38 Vict. c. 51, 1874 (Chain Cables and Anchors).
 37 & 38 Vict. c. 88, s. 37, 1874 (Registration of Births, etc.)
 38 & 39 Vict. c. 15, s. 3, 1875 (Collisions).
 38 & 39 Vict. c. 17, s. 42, 1875 (Explosives).
 38 & 39 Vict. c. 51, 1875 (Pacific Islanders).
 39 & 40 Vict. c. 20, 1876 (Desertion from Portuguese Ship).
 39 & 40 Vict. c. 80, 1876 (Unseaworthy Ships, and Miscellaneous).
 40 & 41 Vict. c. 16, 1877 (Wreck).
 41 & 42 Vict. c. 67, s. 3, sch. 1, 1878 (Foreign Jurisdiction).
 42 & 43 Vict. c. 72, 1879 (Casualties, Investigations).
 43 & 44 Vict. c. 16, 1880 (Payment of Wages and Rating).
 43 & 44 Vict. c. 18, 1880 (Joint Owners).
 43 & 44 Vict. c. 22, 1880 (Fees and Expenses).
 43 & 44 Vict. c. 43, 1880 (Carriage of Grain).
 45 & 46 Vict. c. 55, 1882 (Merchant Shipping Expenses).
 45 & 46 Vict. c. 76, 1882 (Colonial Courts of Inquiry).
 46 & 47 Vict. c. 41, 1883 (Fishing Boats).
 48 & 49 Vict. c. 49, s. 7, 1885 (Submarine Telegraph Act).
 50 Vict. c. 4, 1887 (Fishing Boats).
 50 & 51 Vict. c. 62, 1887 (Merchant Shipping).
 51 & 52 Vict. c. 24, 1888 (Life Saving Appliances).
 52 & 53 Vict. c. 42, s. 30, 1889 (Sailors' Effects).
 52 & 53 Vict. c. 43, 1889 (Tonnage Measurement).
 52 & 53 Vict. c. 46, 1889 (Master's Wages).
 52 & 53 Vict. c. 68, 1889 (Pilotage).
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 53 Vict. c. 9, 1889 (Load Line).
 55 & 56 Vict. c. 37, 1892 (Load Line, Provisions, etc.).

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- 5 & 6 Edw. 6, c. 26, 1551–2 (Sale, etc., of Commissions).
 13 Chas. 2, st. 1, c. 6, 1661 (Command).

- 8 Geo. 1, c. 24, s. 9, 1721-2 (Bringing Goods on board Ship).
- 13 Geo. 2, c. 17, 1739-40 (Exemptions from Impressment).
- 12 Geo. 3, c. 24, 1772 (Destruction of Dockyard, Ship, etc.).
- 37 Geo. 3, c. 70, 1796-7 (Seducing from Allegiance).
- 43 Geo. 3, c. 61, 1802-3 (Certificate to Beg on Discharge).
- 44 Geo. 3, c. 13, 1803-4 (Service on Release from Arrest, etc.).
- 49 Geo. 3, c. 126, 1809 (Sale, etc., of Commissions).
- 55 Geo. 3, c. 184, s. 2, sch., 1814-5 (Exemption from Probate, etc., Duties).
- 59 Geo. 3, c. 25, 1819 (Freight for Specie, etc.).
- 5 Geo. 4, c. 83, s. 16, 1824 (Certificate to Beg on Discharge).
- 4 & 5 Will. 4, c. 24, ss. 21, 25, 1834 (Half Pay, etc.).
- 5 & 6 Will. 4, c. 24, 1835 (Entry and Service).
- 5 & 6 Will. 4, c. 35, 1835 (Paymaster-General substituted for Treasurer).
- 5 & 6 Will. 4, c. 62, ss. 2-4, 1835 (Substitution of Declarations for Oaths).
- 7 Will. 4, & 1 Vict. c. 91, 1837 (Seducing from Allegiance).
- 2 & 3 Vict. c. 51, 1839 (Assignment of Pensions).
- 5 & 6 Vict. c. 82, s. 2, 1842 (Exemption from Probate, etc., Duties).
- 10 & 11 Vict. c. 62, 1847 (Deserters).
- 11 & 12 Vict. c. 55, s. 6, 1847-8 (Naval Prize Account).
- 13 & 14 Vict. c. 26, 1850 (Engagements with Pirates).
- 16 & 17 Vict. c. 59, s. 20, 1852-3 (Exemption from Probate, etc., Duties).
- 16 & 17 Vict. c. 69, 1852-3 (Entry and Service General Provisions).
- 16 & 17 Vict. c. 73, 1852-3 (Service of Seafaring Men).
- 17 & 18 Vict. c. 104, ss. 204, 214-220, 484-498, 1854 (Merchant Shipping).
- 19 & 20 Vict. c. 83, 1856 (Coast Guard).
- 27 & 28 Vict. c. 24, 1864 (Naval Agency and Distribution).
- 27 & 28 Vict. c. 77, ss. 2, 3, 1864 (Commission to Ionian Islanders).
- 28 & 29 Vict. c. 72, 1865 (Navy and Marines, Wills).
- 28 & 29 Vict. c. 73, 1865 (Naval and Marine Pay and Pensions).

28 & 29 Vict. c. 111, 1865 (Navy and Marines, Property of Deceased).

23 & 29 Vict. c. 124, ss. 6-9, 1865 (Offences as to Pay, etc.)

29 & 30 Vict. c. 43, 1866 (Naval Savings Banks).

29 & 30 Vict. c. 109, 1866 (Naval Discipline).

32 & 33 Vict. c. 57, 1868-9 (Seamen's Clothing).

33 & 34 Vict. c. 23, s. 2, 1870 (Treason and Felony).

33 & 34 Vict. c. 96, s. 6, 1870 (Half-pay).

33 & 34 Vict. c. 97, s. 3, sch., 1870 (Stamps).

34 & 35 Vict. c. 36, 1871 (Commutation and Pensions).

35 & 36 Vict. c. 20, s. 7, 1872 (Stamps).

36 & 37 Vict. c. 88, s. 16, 1873 (Bounties under Slave Trade Acts).

38 & 39 Vict. c. 17, s. 97, 1875 (Exemptions from Explosives Act).

42 & 43 Vict. c. 33, s. 179, 1879 (Land Forces).

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47 & 48 Vict. c. 39, 1884 (Naval Discipline Act).

47 & 48 Vict. c. 44, 1884 (Pensions).

47 & 48 Vict. c. 46, 1884 (Naval Enlistment Act).

48 & 49 Vict. c. 42, 1885 (Naval Knights of Windsor).

51 & 52 Vict. c. 31, 1888 (National Defence).

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19 & 20 Vict. c. 83, s. 10, 1856 (Coast Guard).

22 & 23 Vict. c. 40, 1859 (Naval Volunteers).

26 & 27 Vict. c. 69, 1863 (Officers).

28 & 29 Vict. c. 14, 1865 (Colonial Naval Defence).

35 & 36 Vict. c. 73, s. 17, 1872 (Officers).

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24 Vict. c. 10. Admiralty Court Act, 1861.

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- 36 & 37 Vict. c. 66. }
 38 & 39 Vict. c. 77. } Judicature Acts, 1873 and 1875.
 39 & 40 Vict. c. 59, Appellate Jurisdiction Act, 1876.
 s. 23.

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- 26 & 27 Vict. c. 24. Vice-Admiralty Court Act, 1863.
 30 & 31 Vict. c. 45 (Vice-Admiralty Courts Acts Amendment, 1867).
 45 & 46 Vict. c. 41, 1883. (Colonial Courts of Inquiry).
 53 Vict. c. 53, s. 4, 1889 (Naval Prize Act).
 53 & 54 Vict. c. 27, 1890 (Colonial Courts of Admiralty Act, 1890).

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 55 & 56 Vict. c. 29, s. 127, 1892 (Piracy).
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 55 & 56 Vict. c. 20, 1892 (Pilotage).
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3 & 4 VICT. CAP. 65.

An Act to Improve the Practice and Extend the Jurisdiction of the High Court of Admiralty of England.

7TH AUGUST, 1840.

Dean of Arches
to sit for Judge
of Court of Ad-
miralty in cer-
tain cases.

WHEREAS the jurisdiction of the High Court of Admiralty of England may be in certain respects advantageously extended, and the practice thereof improved; be it therefore enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by the authority of the same, that it shall be lawful for the dean of the Arches for the time being to be assistant to and to exercise all the power, authority and jurisdiction, and to have all the privileges and protections of the judge of the said High Court of Admiralty, with respect to all suits and proceedings in the said Court, and that all such suits and proceedings, and all things relating thereto, brought or taking place before the dean of the Arches, whether the judge of the said High Court of Admiralty be or be not at the same time sitting or transacting the business of the same Court, and also during any vacancy of the office of judge of the said Court, shall be of the same force and effect in all respects as if the same had been brought or had taken place before the judge himself, and all such suits and proceedings shall be entered and registered as having been brought and as having taken place before the dean of the Arches sitting for the judge of the High Court of Admiralty.

Advocates, sur-
rogates and
proctors of
Court of Arches
to be admitted
in Court of
Admiralty.

II. And be it declared and enacted, that all persons who now are or at any time hereafter may be entitled to practise as advocates in the Court of Arches are and shall be entitled to practise as advocates in the said High Court of Admiralty; and that all persons who now are or hereafter may be entitled to act as surrogates or proctors in the Court of Arches shall be entitled respectively to practise and act, or to be admitted to practise and act, as the case may be, as

surrogates and proctors in the said High Court of Admiralty, according to the rules and practice now prevailing and observed or hereafter to be made in and by the said High Court of Admiralty touching the admission and practising of advocates, surrogates and proctors in the said Court respectively.

III. And be it enacted, that after the passing of this act, whenever any ship or vessel shall be under arrest by process issuing from the said High Court of Admiralty, or the proceeds of any ship or vessel having been so arrested shall have been brought into and be in the registry of the said Court, in either such case the said Court shall have full jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claims or causes of action respectively.

IV. And be it enacted, that the said Court of Admiralty shall have jurisdiction to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages or bottomry, which shall be instituted in the said Court after the passing of this Act.

V. And be it enacted, that whenever any award shall have been made by any justices of the peace or by any person nominated by them, or within the jurisdiction of the cinque ports by any commissioners, respecting the amount of salvage to be paid, or respecting any claims and demands for services or compensation, which such justices and commissioners within their several jurisdictions are empowered to decide under the provisions of two Acts passed in the second year of the reign of King George the Fourth, for remedying certain defects relative to the adjustment of salvage, or whenever any sum shall have been voluntarily paid on any such account of salvage, services or compensation, it shall be lawful for any person interested in the distribution of the amount awarded or paid to require distribution to be forthwith made thereof, and the person or persons by

Whenever a vessel shall be arrested or proceeds brought into registry, the Court to have jurisdiction over claims of mortgagees.

Court to decide questions of title in all causes of possession, salvage, etc.

Appeals may be made to the Court of Admiralty on distribution.

whom such amount shall be awarded, or, in the case of voluntary payment, the person by whom the same shall have been received, shall forthwith proceed to the distribution thereof among the several persons entitled thereunto, to be certified in the case of an award under the hand of the person or persons by whom such amount shall be awarded, and an account of every such distribution shall be annexed to the award; and if any person interested in the distribution shall think himself aggrieved on account of its not being made according to the award, or otherwise, it shall be lawful for him, within fourteen days after the making of the award, or payment of the money, but not afterwards, to take out a monition from the said High Court of Admiralty requiring any person being in possession of any part of the amount awarded or voluntarily paid to bring in the same, to abide the judgment of the Court concerning the distribution thereof; and in the case of an award, the person or persons by whom the award shall have been made shall, upon motion, send without delay to the said High Court of Admiralty a copy of the proceedings before him and them, and of the award, on unstamped paper, certified under his or their hand; and the same shall be admitted by the Court as evidence, and the amount awarded or voluntarily paid shall be distributed according to the judgment of the Court.

The Court, in certain cases, may adjudicate on claims for services and necessities, although not on the high seas.

VI. And be it enacted, that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of towage, or for necessities supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered or damage received, or necessities furnished, in respect of which such claim is made.

Evidence may be taken *ex* *voce* in open Court.

VII. And be it enacted, that in any suit depending in the said High Court of Admiralty, the Court (if it shall think

fit) may summon before it and examine, or cause to be examined, witnesses by word of mouth, and either before or after examination by deposition, or before a commissioner, as hereinafter mentioned; and notes of such evidence shall be taken down in writing by the judge or registrar, or by such other person or persons, and in such manner, as the judge of the said Court shall direct.

VIII. And be it enacted, that the said Court may, if it shall think fit, in any such suit issue one or more special commissions to some person being an advocate of the said High Court of Admiralty of not less than seven years' standing, or a barrister-at-law of not less than seven years' standing, to take evidence by word of mouth, upon oath, which every such commissioner is hereby empowered to administer, at such time or times, place or places, and as to such fact or facts, and in such manner, order and course, and under such limitations and restrictions, and to transmit the same to the registry of the said Court, in such form and manner as in and by the commission shall be directed; and that such commissioner shall be attended, and the witnesses shall be examined, cross-examined and re-examined by the parties, their counsel, proctors or agents, if such parties, or either of them, shall think fit so to do; and such commission shall, if need be, make a special report to the Court touching such examination, and the conduct or absence of any witness or other person thereon or relating thereto; and the said High Court of Admiralty is hereby authorized to institute such proceedings, and make such order or orders, upon such report, as justice may require, and as may be instituted or made in any case of contempt of the said Court.

IX. And be it enacted, that it shall be lawful in any suit depending in the said Court of Admiralty for the judge of the said Court, or for any such commissioner appointed in pursuance of this Act, to require the attendance of any witnesses, and the production of any deeds, evidences, books or writings, by writ, to be issued by such judge or commissioner in such and the same form, or as nearly as may

Evidence may
be taken *vide*
 voce before a
commissioner.

Attendance of
witnesses and
production of
papers may be
compelled by
subpoena.

be, as that in which a writ of *subpœna ad testificandum*, or of *subpœna duces tecum*, is now issued by Her Majesty's Court of Queen's Bench at Westminster; and that every person disobeying any such writ so to be issued by the said judge or commissioner, shall be considered as in contempt of the said High Court of Admiralty, and may be punished for such contempt in the said Court.

Provisions of
8 & 4 Will. 4,
c. 42, extended
to Court of Ad-
miralty.

X. And be it enacted, that all the provisions of an Act passed in the fourth year of the reign of his late Majesty, intituled "An Act for the further amendment of the law and better administration of justice," with respect to the admissibility of the evidence of witnesses interested on account of the verdict or judgment, shall extend to the admissibility of evidence in any suit pending in the said Court of Admiralty, and the entry directed by the said Act to be made on the record of judgment shall be made upon the document containing the final sentence of the said Court, and shall have the like effect as the entry on such record.

Power to direct
issues.

XI. And be it enacted, that in any contested suit depending in the said Court of Admiralty, the said Court shall have power, if it shall think fit so to do, to direct a trial by jury of any issue or issues on any question or questions of fact arising in any such suit, and that the substance and form of such issue or issues shall be specified by the judge of the said Court at the time of directing the same; and if the parties differ in drawing such issue or issues, it shall be referred to the judge of the said Court to settle the same; and such trial shall be had before some judge of Her Majesty's Superior Courts of Common Law at Westminster, at the sittings at Nisi Prius in London or Middlesex, or before some judge of Assize at Nisi Prius, as to the said Court shall seem fit.

Costs of issues
and commis-
sions to be in
the discretion of
the Court.

XII. And be it enacted, that the costs of such issues, or of such commission as aforesaid, as the judge of the said High Court of Admiralty shall under this Act direct, shall be paid by such party or parties, person or persons, and be taxed by the registrar of the said High Court of Admiralty, in such manner as the said judge shall direct, and that payment of

such costs shall be enforced in the same manner as costs between party and party may be enforced in other proceedings in the said Court.

XIII. And be it enacted, that the said Court of Admiralty, Power to direct new trials. upon application to be made within three calendar months after the trial of any such issue by any party concerned, may grant and direct one or more new trials of any such issue, and may order such new trial to take place in the manner hereinbefore directed with regard to the first trial of such issue, and may, by order of the same Court, direct such costs to be paid as to the said Court shall seem fit upon any application for a new trial, or upon any new trial, or second or other new trial, and may direct by whom and to whom, and at what times and in what manner, such costs shall be paid.

XIV. And be it enacted, that the granting or refusing to Granting or refusing new trial, matter of appeal. grant an issue, or a new trial of any such issue, may be matter of appeal to Her Majesty in Council.

XV. And be it enacted, that at the trial of any issue Bills of exceptions to be allowed on trials of issues. directed by the said High Court of Admiralty, either party shall have all the like powers, rights and remedies with respect to bills of exceptions as parties impleaded before justices may have, by virtue of the statute made in that behalf in the thirteenth year of the reign of King Edward the First, with respect to exceptions alleged by them before such justices, or by any other statute made in the like behalf; and every such bill of exceptions, sealed with the seal of the judge or judges to whom such exceptions shall have been made, shall be annexed to the record of the trial of the said issue.

XVI. And be it enacted, that the record of the said issue, Record of the issue to be transmitted to the Court of Admiralty. and of the verdict therein, shall be transmitted by the associate or other proper officer to the registrar of the said Court of Admiralty; and the verdict of the jury upon any such issue (unless the same shall be set aside) shall be conclusive upon the said Court and upon all such persons; and in all further proceedings in the cause in which such fact is found

the said Court shall assume such fact to be as found by the jury.

Provisions of
2 & 3 Will. 4,
c. 92, as to ap-
peals to apply
to suits in Court
of Admiralty
under this Act.

XVII. And be it enacted, that every person who, if this Act had not been passed, might have appealed and made suit to Her Majesty in Council against any proceeding, decree, or sentence of the said High Court of Admiralty under or by virtue of an Act passed in the third year of the reign of his late Majesty, intituled, "An Act for transferring the powers of the High Court of Delegates, both in Ecclesiastical and Maritime causes, to His Majesty in Council," may in like manner appeal and make suits to Her Majesty in Council against the proceedings, decrees and sentences of the said Court in all suits instituted and proceedings had in the same by virtue of the provisions of this Act, and that all the provisions of the said last-mentioned Act shall apply to all appeals and suits against the proceedings, decrees and sentences of the said Court in suits instituted and proceedings had by virtue of the provisions of this Act; and such appeals and suits shall be proceeded in in the manner and form provided by an Act passed in the fourth year of the reign of his late Majesty, intituled "An Act for the better administration of justice in His Majesty's Privy Council;" and all the provisions of the said last-mentioned Act relating to appeals and suits from the High Court of Admiralty shall be applied to appeals and suits from the said Court in suits instituted and proceedings had by virtue of the provisions of this Act; provided always, that in any such appeal the notes of evidence taken as hereinbefore provided by or under the direction of the judge of the said High Court of Admiralty shall be certified by the said judge to Her Majesty in Council, and shall be admitted to prove the oral evidence given in the said Court of Admiralty, and that no evidence shall be admitted on such appeal to contradict the notes of evidence so taken and certified as aforesaid, but this proviso shall not enure to prevent the judicial committee of the Privy Council from directing witnesses to be examined and re-examined upon such facts as to the committee shall seem fit, in the manner directed by the last-recited Act.

3 & 4 Will. 4,
c. 41, to apply in
same manner.

Certified notes
of evidence
taken may be
admitted on
appeal.

XVIII. And be it enacted, that it shall be lawful for the judge of the said High Court of Admiralty from time to time to make such rules, orders and regulations respecting the practice and mode of proceeding of the said Court, and the conduct and duties of the officers and practitioners therein, as to him shall seem fit, and from time to time to repeal or alter such rules, orders or regulations: provided always, that no such rules, orders or regulations shall be of any force or effect until the same shall have been approved by Her Majesty in Council.

Power for judge of Admiralty to make rules of Court.

XIX. And be it declared and enacted, that no action shall lie against the judge of the said High Court of Admiralty for error in judgment, and that the said judge shall be entitled to and have all privileges and protections in the exercise of his jurisdiction as judge of the said Court which by law appertain to the judges of Her Majesty's Superior Courts of Common Law in the exercise of their several jurisdictions.

Protection of the judge of the Court of Admiralty.

XX. And be it enacted, that the keeper for the time being of every common jail or prison shall be bound to receive and take into his custody all persons who shall be committed thereunto by the said Court of Admiralty, or who shall be committed thereunto by any coroner appointed by the judge of the said Court of Admiralty, upon any inquest taken within or upon the high seas adjacent to the county or other jurisdiction to which such jail or prison belongs; and every keeper of any jail or prison who shall refuse to receive into his custody any person so committed, or wilfully or carelessly suffer such person to escape and go at large without lawful warrant, shall be liable to the like penalties and consequences as if such person had been committed to his custody by any other lawful authority.

Jailers to receive prisoners committed by the Court of Admiralty or by Admiralty coroners.

XXI. And be it enacted, that it shall be lawful for the judge of the said High Court of Admiralty to order the discharge of any person who shall be in custody for contempt of the said Court, for any cause other than for non-payment of money, on such conditions as to the judge shall seem just; provided always, that the order for such discharge

Prisoners in contempt may be discharged.

shall not be deemed to have purged the original contempt in case the conditions on which such order shall be made be not fulfilled.

Jurisdiction to
try questions
concerning
booty of war.

XXII. And be it enacted, that the said High Court of Admiralty shall have jurisdiction to decide all matters and questions concerning booty of war, or the distribution thereof, which it shall please Her Majesty, her heirs and successors, by the advice of her and their privy council, to refer to the judgment of the said Court; and in all matters so referred the Court shall proceed as in cases of prize of war, and the judgment of the Court therein shall be binding upon all parties concerned.

Jurisdiction of
Courts of law
and equity not
taken away

XXIII. Provided always, and be it enacted, that nothing herein contained shall be deemed to preclude any of Her Majesty's Courts of Law or Equity now having jurisdiction over the several subject matters and causes of action hereinbefore mentioned from continuing to exercise such jurisdiction as fully as if this Act had not been passed.

Act may be
amended, this
session.

XXIV. And be it enacted, that this Act may be repealed or amended by any Act to be passed in this session of Parliament.

CANADA—LAWS RELATING TO THE CONSTITUTION, ETC.

An Act for making more effectual provision for the gov-^{14 Geo. III,}
ernment of the Province of Quebec, in North America.—^{Cap. 83.}
(Passed in 1774).

An Act to establish a fund towards further defraying the^{14 Geo. III,}
charges of the administration of justice and support of the^{Cap. 83.}
Civil Government within the Province of Quebec in America.
—(Passed in 1774).

An Act for removing all doubts and apprehensions con-^{18 Geo. III,}
cerning taxation by the Parliament of Great Britain, in any^{Cap. 12.}
of the colonies, provinces, and plantations in North America
and the West Indies, and for repealing so much of an Act
made in the seventh year of the reign of his present Majesty
as imposes a duty on tea imported from Great Britain into
any colony or plantation in America, or relates thereto.—
(1778).

An Act to repeal certain parts of an Act passed in the^{31 Geo. III,}
fourteenth year of His Majesty's reign, intituled : "An Act^{Cap. 31.}
for making more effectual provision for the government of
the Province of Quebec, in North America; and to make
further provision for the government of the said province.
—(Passed in 1791).

An Act for extending the jurisdiction of the Courts of^{43 Geo. III,}
Justice in the Provinces of Lower and Upper Canada to the^{Cap. 138.}
trial and punishment of persons guilty of crimes and offences^{As to offences within Indian Territory.}
within certain parts of North America adjoining to the said
provinces.—(11th August, 1803).

An Act to make temporary provision for the government^{1 & 2 Vic. Cap. 9.}
of Lower Canada.—(10th February, 1838).

An Act to amend an Act of the last session of parliament^{2 & 3 Vic. Cap.}
for making temporary provision for the government of^{58.}
Lower Canada.—(17th August, 1839).

3 & 4 Vic. Cap. 35. An Act to re-unite the Provinces of Upper and Lower Canada, and for the government of Canada.—(23rd July, 1840).

3 & 4 Vic. Cap. 78. Clergy Reserves. An Act to provide for the sale of the Clergy Reserves in the Province of Canada, and for the distribution of the proceeds thereof.—(7th August, 1840).

10 & 11 Vic. Cap. 71. An Act to authorize Her Majesty to assent to a certain bill of the Legislative Council and Assembly of the Province of Canada for granting a civil list to Her Majesty; and to repeal certain parts of an Act for re-uniting the Provinces of Upper and Lower Canada, and for the government of Canada.—(22nd July, 1847).

11 & 12 Vic. Cap. 56. An Act to repeal so much of an Act of the third and fourth years of Her present Majesty, to re-unite the Provinces of Upper and Lower Canada, and for the government of Canada, as relates to the use of the English language in instruments relating to the Legislative Council and Legislative Assembly of the Province of Canada.—(14th August, 1848).

15 & 16 Vic. Cap. 21. An Act to authorize the Legislature of the Province of Canada to make provisions concerning the Clergy Reserves in that province, and the proceeds thereof.—(9th May, 1853).

17 & 18 Vic. Cap. 118. An Act to empower the Legislature of Canada to alter the Constitution of the Legislative Council for that province, and for other purposes.—(11th August, 1854).

22 & 23 Vic. Cap. 10. An Act to empower the Legislature of Canada to make laws regulating the appointment of a Speaker of the Legislative Council.—(8th August, 1859).

ADMIRALTY.

12 & 13 Vic. Cap. 96. An Act to provide for the prosecution and trial in Her Majesty's Colonies of offences committed within the jurisdiction of the Admiralty.—(1st August, 1849).

Whereas, by an Act passed in the eleventh year of the reign of King William the Third, intituled, "An Act for the more effectual suppression of piracy," it is enacted that all piracies, felonies, and robberies committed on the sea, or

in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, may be examined, enquired of, tried, heard, and determined, and adjudged in any place at sea, or upon the land in any of His Majesty's islands, plantations, colonies, dominions, forts or factories, to be appointed for that purpose by the King's Commission, in the manner therein directed, and according to the civil law and the method and rules of the Admiralty; and whereas, by an Act passed in the forty-sixth year of the reign of King George the Third, intituled, "An Act for the speedy trial of offences committed in distant parts upon the sea," it is enacted that all treasons, piracies, felonies, robberies, murders, conspiracies, and other offences of what nature or kind soever committed upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, may be enquired of, tried, heard, determined, and adjudged, according to the common course of the laws of this realm used for offences committed upon the land within this realm, and not otherwise, in any of His Majesty's islands, plantations, colonies, dominions, forts and factories, under and by virtue of the King's Commission or Commissions, under the Great Seal of Great Britain, to be directed to Commissioners in the manner and with the powers and authorities therein provided.

And Whereas, it is expedient to make further and better provisions for the apprehension, custody and trial, in Her Majesty's islands, plantations, colonies, dominions, forts and factories, of persons charged with the commission of such offences on the sea, or in any such haven, river, creek, or place as aforesaid—be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by the authority of the same, that if any person within any colony shall be charged with the commission of any treason, piracy, felony, robbery, murder, conspiracy, or other offence of what nature or kind soever committed upon the sea, or in any such haven, river, creek or place, where the admiral or admirals have power,

authority, or jurisdiction; or if any person charged with the commission of any such offence upon the sea, or in any such haven, river, creek or place, shall be brought for trial to any colony, then, and in every such case, all magistrates, justices of the peace, public prosecutors, juries, judges, courts, public officers, and other persons in such colony, shall have and exercise the same jurisdiction and authorities for inquiring of, trying, hearing, determining, and adjudging such offences; and they are hereby respectively authorized, empowered, and required to institute and carry on all such proceedings for the bringing of such person so charged as aforesaid to trial, and for and auxiliary to and consequent upon the trial of any such person for such offence wherewith he may be charged as aforesaid, as by the law of such colony would and ought to have been had and exercised or instituted and carried on by them respectively, if such offence had been committed and such person had been charged with having committed the same upon any waters situate within the limits of any such colony, and within the limits of the local jurisdiction of the Courts of criminal justice of such colony.

II. Provided always, and be it enacted, that if any person shall be convicted before any such Court of any such offence, such person so convicted shall be subject and liable to and shall suffer all such, and the same pains, penalties and forfeitures as by any law or laws now in force, persons convicted of the same respectively would be subject and liable to in case such offence had been committed, and were inquired of, tried, heard, determined, and adjudged in England any law, statute, or usage, to the contrary notwithstanding.

III. And be it enacted that where any person shall die in any colony of any stroke, poisoning or hurt, such person having been feloniously stricken, poisoned, or hurt upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, or at any place out of such colony, every offence committed in respect of any such case, whether the same shall amount

to the offence of murder, or of manslaughter, or of being an accessory before the fact to murder, or after the fact, to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished, in such colony, in the same manner, in all respects, as if such offence had been wholly committed in that colony, and that if any person in any colony shall be charged with any such offence as aforesaid, in respect of the death of any person who having been feloniously stricken, poisoned, or otherwise hurt, shall have died of such stroke, poisoning or hurt upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, such offence shall be held for the purposes of this act to have been wholly committed upon the sea.

IV. Not to affect jurisdiction of Supreme Court of New South Wales or Van Diemen's Land, 9 Geo. IV., cap. 83.

V. And be it enacted that for the purposes of this Act the word "colony" shall mean any island, plantation, colony, dominion, fort, or factory of Her Majesty, except any island within the United Kingdom, and islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent thereto respectively, and except also all such parts and places as are under the government of the East India Company, and the word "Governor" shall mean the officer for the time being administering the government of any colony.

VI. And be it enacted, this Act may be amended or repealed by any Act to be passed during this present session of parliament.

An Act to extend provisions for admiralty jurisdiction in the colonies to Her Majesty's territories in India. 23 & 24 Vic. Cap. 83.

An Act to extend the jurisdiction and improve the practice of the High Court of Admiralty.—(Passed 17th May, 1861). 24 & 25 Vic. Cap. 10.

"If any person, being a British subject, charged with having committed any crime, or offence, on board any British ship on the high seas, or in any foreign port or harbor, or if any person, not being a British subject, charged 18 & 19 Vic. Cap. 91, Sect. 21, of Merchant Seamen' Ship- ping Act.

with having committed any crime or offence on any British ship on the high seas, is found within the jurisdiction of any court of justice in Her Majesty's dominions, which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such Court shall have jurisdiction to hear and try the case, as if such crime or offence had been committed within such limits; provided that nothing contained in this section shall be construed to alter or interfere with the Act of the thirteenth year of her present Majesty, chapter ninety-six.

AS TO ALIENS.

10 & 11 Vic.
Cap. 88.

An Act for the Naturalization of Aliens—(22nd July, 1847).

Sec. 1.—All Acts, Statutes, etc., of Colonial Legislatures imparting privileges of naturalization (to be enjoyed, etc., within the respective limits of such colonies or possessions respectively) valid.

Sec. 2.—All laws, etc., heretofore made imparting privileges of naturalization valid, but subject to confirmation or disallowance by Her Majesty.

Sec. 3.—Act of 7 & 8 Vic., Cap. 66, not to extend to colonies or possessions abroad.

(Memo.—7 & 8 Vic., Cap. 66.—“An Act to amend the law relating to aliens.”—6th August, 1844.

Sec. 3.—Every person born of a British mother may hold, real or personal estate.

Sec. 4.—Alien friend may hold every species of personal property except chattels real.

Sec. 5.—Subjects of Friendly State may hold lands, etc., for the purpose of residence, etc., for twenty-one years.

Sec. 6.—Aliens to become naturalized upon obtaining certificate, taking prescribed oath, etc.

Sec. 7.—Aliens desirous of becoming naturalized, to present a memorial.

Sec. 8.—Memorial to be considered by the Secretary of State for the Home Department, who may issue a certificate.

Sec. 9.—Certificate to be enrolled in Chancery.

Sec. 13.—Naturalized persons resident for five years to enjoy rights as British subjects.

Sec. 16.—Women married to natural born subjects deemed naturalized).

AN ACT RELATING TO ATTORNEYS.

“An Act to regulate the admission of attorneys and solicitors of Colonial Courts in Her Majesty’s Superior Courts of Law and Equity in England in certain cases.”—(17th August, 1857).
20 & 21 Vic. Cap. 39.

Sec. 1.—This Act may, for all purposes, be cited as “The Colonial Attorney’s Relief Act.”

Sec. 2.—Act not to come into operation until directed by Order in Council.

Sec. 3.—All persons who, being subjects of the British Crown, have been, or shall hereafter be duly admitted and enrolled as attorneys and solicitors in the Superior Courts of Law and Equity in those of Her Majesty’s colonies or dependencies, where the system of jurisprudence is founded on, or assimilated to the common law and principles of Equity, as administered in England, and where full service, under articles of clerkship to an attorney at law, for the space of five years at the least, and an examination to test the qualification of candidates, are or may be required previous to such admission, save only in the case of persons previously admitted as attorneys or solicitors in the Superior Courts of Law or Equity in England, such colonies or dependencies to be from time to time specified in and by Order in Council, as hereinafter provided, shall, and may be admitted, and enrolled attorneys in all or any of the Courts of Queen’s Bench, Common Pleas and Exchequer, and other Courts of England, and solicitors in the High Court of Chancery in England, subject as hereinafter provided.

Sec. 4.—No person shall be deemed qualified to be admitted as attorney or solicitor under provisions of this Act, unless he pass examination as to fitness as hereinafter provided, produce certificate from presiding judge of Superior Court of Common Law in colony, etc., where he was admitted an attorney, etc., stating amount of stamps paid on his articles of clerkship and admission, and shall further make affidavit in manner provided by order of judges, etc., that he is resident within jurisdiction of Superior Courts of Law and Equity in England, and that he has ceased to practice for twelve months at least in any Colonial Court of Law.

Sec. 5.—It shall be lawful for the judges of Queen's Bench, Common Pleas, and Exchequer, or any three of them, when any person shall seek admission as attorney only, under provisions of this Act, and the Master of the Rolls to inquire into the qualification of such person, and appoint such persons as examiners, as they may think proper, etc., and if found duly qualified, cause him to be admitted.

Sec. 6.—As to stamp duties on admissions, same as those required for admission in England, together with such further stamp as shall, with the amount of stamps paid on articles of clerkship and admission in the colony be equal in amount to the sum payable on articles of clerkship in England.

Sec. 7.—Her Majesty may, from time to time, by Order in Council, direct this Act to come into operation as to any one or more of Her Majesty's colonies or dependencies, and thereupon, but not otherwise, the provisions of this Act shall apply to persons duly admitted as attorneys and solicitors in the Superior Courts of Law and Equity in such colonies or dependencies, but no such Order in Council shall be made in respect of any colony, except upon application made by the governor or person exercising the functions of governor of such colony or dependency, and until it shall be shewn to the satisfaction of Her Majesty's principal Secretary of State for the Colonies that the system of jurisprudence, as administered in such colony or de-

pendency, and the qualification for admission as an attorney or solicitor in the Superior Courts of Law and Equity in such colony or dependency, answer to, and fulfil the conditions specified in section 3, hereinbefore contained, and also that the attorneys or solicitors of the Superior Courts of Law or Equity in England are admitted as attorneys and solicitors in the Superior Courts of Law and Equity of such colony or dependency, on production of their certificates of admission in the English Courts, without service or examination in the colony or dependency.

BRITISH COLUMBIA.

“An Act to provide for the government of British Columbia.”—(Passed 2nd August, 1858). 21 & 22 Vic.
Cap. 99.

BRITISH NORTH AMERICA ACT 1867.

Title: “An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the government thereof: and for purposes connected therewith.”—(Passed 29th March, 1867). 30 & 31 Vic.
Cap. 3.

BRITISH SHIPPING AND NAVIGATION.

“An Act to amend the laws in force for the encouragement of British Shipping and Navigation.”—(Passed 26th June, 1849). 12 & 13 Vic.
Cap. 29.

COIN—OFFENCES AGAINST.

“An Act for the punishment of offences in the colonies in relation to the coin.”—(4th August, 1853). 16 & 17 Vic.
Cap. 48.

Sec. 1.—2 & 3 Wm. IV.—As amended by 1 Vic. cap. 90, extended to the colonies.

Sec. 2.—Punishment for importing counterfeit coin into the colonies, liable to be transported for life, or for any term not exceeding seven years, or be imprisoned for any term not exceeding four years.

Sec. 3.—Not to apply in any colony to any offence for punishment whereof local provision is already made.

Sec. 4.—Power to Local Legislature to vary provisions of this Act (may alter or repeal—all, or any).

COLONIAL LAWS—DOUBTS AS TO VALIDITY OF.

28 & 29 Vic.
Cap. 63.

“An Act to remove doubts as to the validity of Colonial Laws.”—(29th June, 1865).

Sec. 1.—Definitions.

“Colony”—shall include all Her Majesty’s possessions wherein there shall exist a legislature, etc.

“Legislature” and “Colonial Legislature” shall severally signify the authority, other than the Imperial Parliament or Her Majesty in Council, competent to make laws for any colony.

“Representative Legislature” shall signify any Colonial Legislature, which shall comprise a legislative body, of which one-half are elected by inhabitants of the country.

“Colonial Law” shall include laws made for any colony, either by the Legislature or by Her Majesty in Council.

Act of Parliament to extend to colony, when made applicable to such colony by express words or necessary intendment of any Act of Parliament.

“Governor.”—Officer lawfully administering the government.

“Letters Patent” shall mean Letters Patent under Great Seal of United Kingdom of Great Britain and Ireland.

Sec. 2.—Colonial Law void for repugnancy, when in any respect repugnant to the provisions of an Act of Parliament extending to the colony to which law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force or effect of such Act, shall be read, subject to such Act, order or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Sec. 3.—Colonial Law not void for repugnancy to the law of England, unless repugnant to the provisions of some such Act of Parliament, order or regulation, as aforesaid.

Sec. 4.—Colonial Law not void for inconsistency with instructions with reference to such law, or the subject thereof,

which may have been given to such governor by or on behalf of Her Majesty, etc.

Sec. 5.—Colonial Legislature may establish Courts of Law, and representative legislature may alter constitution—provided such laws, respecting constitution, passed in manner and form as required by any Act of Parliament—Letters Patent—Order in Council for the time being in force in the said colony.

Sec. 6.—The certificate of the clerk, or other proper officer, of legislative body in any colony, to the effect that the document to which it is attached, is a true copy of any colonial law assented to by the governor of such colony, or of any bill reserved for the signification of Her Majesty's pleasure, by the said governor, shall be *prima facie* evidence that the document so certified is a true copy of such law or bill, and as the case may be, that such law has been duly and properly passed and assented to, or that such bill has been duly and properly passed and presented to the governor; and any proclamation purporting to be published by authority of the governor in any newspaper in the colony, to which such law or bill shall relate, and signifying Her Majesty's disallowance of any such colonial law, or Her Majesty's assent to any such reserved bill as aforesaid, shall be *prima facie* evidence of such disallowance or assent.

Sec. 7.—Certain enactments of legislature of South Australia to be valid.

DEBTS IN COLONIES.

“An Act for the more easy recovery of debts in His Majesty's Plantations and Colonies in America.”—(Passed in 1732). 5 Geo. II, Cap. 7.

Whereas, His Majesty's subjects trading to the British plantations in America lie under great difficulties for want of more easy methods of proving, recovering, and levying of debts due to them than are now used in some of the said plantations; and whereas it will tend very much to the retrieving of the credit formerly given by the trading subjects of Great Britain to the natives and inhabitants of the said

plantations, and to the advancing of the trade of this kingdom thither, if such inconveniences were remedied ; may it therefore please Your Majesty that it may be enacted, and be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons, in this present parliament assembled, and by the authority of the same, that from and after the twenty-ninth day of September, which shall be in the year of our Lord one thousand seven hundred and thirty-two, in any action or suit then depending, or thereafter to be brought in any Court of Law or Equity in any of the said plantations, for or relating to any debt or account wherein any person residing in Great Britain shall be a party, it shall and may be lawful to and for the plaintiff or defendant, and also to and for any witness to be examined or made use of in such action or suit to verify or prove any matter or thing by affidavit or affidavits in writing upon oath, or in case the person making such affidavit be one of the people called Quakers, then upon his or her solemn affirmation made before any mayor or other chief magistrate of the city, borough or town corporate in Great Britain, where or near to which the person making such affidavit or affirmation shall reside, and certified and transmitted under the common seal of such city, borough or town corporate, or the seal of the office of such mayor or other chief magistrate, which oath and solemn affirmation every such mayor and chief magistrate shall be, and is hereby authorized and empowered to administer ; and every affidavit or affirmation so made, certified and transmitted shall, in all such actions and suits, be allowed to be of the same force and effect as if the person or persons making the same upon oath or solemn affirmation, as aforesaid, had appeared, and sworn or affirmed the matters contained in such affidavit or affirmation, *viva voce*, in open Court, or upon a commission issued for the examination of witnesses of any party in such action or suit respectively : provided that in every such affidavit and affirmation there shall be expressed the addition of the party making such affidavit or affirmation, and the particular place of his or her abode.

Sec. 2.—And be it further enacted by the authority aforesaid, that in all suits now depending, or hereafter to be brought in any Court of Law or Equity, by or on behalf of His Majesty, his heirs and successors, in any of the said plantations, for or relating to any debt or account that His Majesty, his heirs and successors, shall and may prove his and their debts and accounts, and examine his or their witness or witnesses, by affidavit or affirmation, in like manner as any subject or subjects is, or are empowered, or may do by this present Act.

Sec. 3.—Provided always, and it is hereby further enacted, that if any person making such affidavit upon oath or solemn affirmation, as aforesaid, shall be guilty of falsely and wilfully swearing or affirming any matter or thing in such affidavit or affirmation, which, if the same had been sworn upon an examination in the usual form, would have amounted to wilful and corrupt perjury, every person so offending being thereof lawfully convicted, shall incur the same penalties and forfeitures as by the laws and statutes of this realm are provided against persons convicted of wilful and corrupt perjury.

Sec. 4.—And be it further enacted by the authority aforesaid, that from and after the said twenty-ninth day of September, one thousand seven hundred and thirty-two, the houses, lands, negroes, and other hereditaments, and real estates, situate or being within any of the said plantations belonging to any person indebted, shall be liable to, and chargeable with all just debts, duties and demands of what nature or kind soever, owing by any such persons to His Majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England, liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process in any Court of Law and Equity, in any of the said plantations respectively, for seizing, extending, selling, or disposing of any such houses, lands, negroes, and other hereditaments and real estates, towards the satisfaction of such debts, duties and demands, and in like manner as personal estates in any of the said

plantations respectively, are seized, extended, sold, or disposed of for the satisfaction of debts.

14 Geo. III,
Cap. 79.

An Act for explaining an Act made in the twelfth year of the reign of Queen Anne, intituled "An Act to reduce the rate of interest without any prejudice to parliamentary securities." Relates to Ireland and West Indies only.

Memo.—Above Act explained by 1 & 2 Geo. IV., Cap. 51. 1 & 2 Geo. IV., Cap. 51, repealed by 3 Geo. IV., Cap. 47.

37 Geo. III,
Cap. 119.

An Act to repeal so much of an Act made in the fifth year of the reign of his late Majesty King George the Second, intituled "An Act for the more easy recovery of debts in His Majesty's plantations and colonies in America as makes negroes chattels for the payment of debts."—(19th July, 1797).

5 & 6 Wm. IV,
Cap. 62.

An Act to repeal an Act of the present session of parliament, intituled "An Act for the more effectual abolition of oaths and affirmations taken and made in various departments of the State, and to substitute declarations in lieu thereof, and for the more entire suppression of voluntary and extrajudicial oaths and affidavits, and to make other provisions for the abolition of unnecessary oaths."—(9th September, 1835).

Sec. 15.—Be it enacted, that from and after the commencement of this Act, in any action or suit then depending, or thereafter to be brought, or intended to be brought in any Court of Law or Equity, within any of the territories, plantations, colonies, or dependencies abroad, being within and part of His Majesty's dominions, for or relating to any debt or account, etc. Declaration may be substituted for oaths and affidavits required by 5 Geo. II., Cap. 7 (see page 333), and 54 Geo. III., Cap. 15.

(Memo.—54 Geo. III., Cap. 15, Sec. 1, provides that in any suit brought in any Court of Law or Equity in New South Wales, where one of the parties is in England, the plaintiff or defendant, or any witness to be examined and made use of in such action or suit, to verify or prove by affidavit, or if a Quaker, by solemn affirmation, such matter

or thing before the chief magistrate or mayor of city, etc., in Great Britain, and certified and transmitted under the common seal of the city, or official seal of chief magistrate, any such affidavit or affirmation shall have the same force and effect as if the parties were examined *viva voce* in open Court; affidavit to give addition and place of abode of party making it).

EVIDENCE—UNSWORN TESTIMONY IN CERTAIN CASES.

“An Act to authorize the legislatures of certain of Her^{6 & 7 Vic. Cap. 22.} Majesty’s colonies to pass laws for the admission, in certain cases, of unsworn testimony in civil and criminal proceedings.”—(31st May, 1843).

Whereas, there are resident within the limits of or in countries adjacent to divers of the British colonies and plantations abroad, various tribes of barbarous and uncivilized people, who, being destitute of the knowledge of God, and of any religious belief, are incapable of giving evidence on oath in any Court of Justice within such colonies or plantations; and whereas doubts have arisen whether any laws which have been, or which might be made by the legislatures of such colonies respectively, to provide for the admissibility in such Courts of the evidence of such persons are not, or would not be repugnant to the Law of England, and therefore null and void; and it is expedient that such doubts should be removed: Be it therefore enacted by the Queen’s Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, that no law or ordinance made, or to be made, by the legislature of any British colony, for the admission of the evidence of any such persons as aforesaid, in any Court, or before any magistrate within any such colony, shall be, or be deemed to have been, null and void, or invalid by reason of any repugnancy, or supposed repugnancy, of any such enactment to the law of England; but that every law or ordinance made, or to be made, by any such legislature, as aforesaid, for the admission before any such Court or

magistrate, of the evidence of any such persons as aforesaid, on any conditions thereby imposed, shall have such and the same effect, and shall be subject to the confirmation or disallowance of Her Majesty, in such and the same manner as any other law or ordinance enacted for any other purpose by any such colonial legislature.

Sec. 2.—And be it enacted, that this Act may be amended or repealed by any Act to be passed in the present session of parliament.

FISHERIES CONVENTION AND RECIPROCITY TREATY WITH UNITED STATES.

18 & 19 Vic.
Cap. 8.

“An Act to carry into effect a treaty between Her Majesty and the United States of America.”—(19th February, 1855).

HABEAS CORPUS.

25 & 26 Vic.
Cap. 20.

“Act respecting the issue of writs of Habeas Corpus out of England into Her Majesty’s possessions abroad.”—(16th May, 1862).

Sec. 1.—Writ not to issue out of England into any colony or foreign dominion of the Crown, etc., having a Court with authority to grant such writ.

Sec. 2.—Not to affect right of appeal to Her Majesty in Council now by law existing.

INTERCOLONIAL RAILWAY.

30 & 31 Vic.
Cap. 16.

“An Act for authorizing a guarantee of interest on a loan to be raised by Canada towards the construction of a railway connecting Quebec and Halifax.”—(Passed 12th April, 1867).

VALIDITY OF MARRIAGES.

28 & 29 Vic.
Cap. 64.

“An Act to remove doubts respecting the validity of certain marriages contracted in Her Majesty’s possessions abroad.”—(29th June, 1865).

Sec. 1.—Colonial laws establishing validity of marriages to have effect throughout Her Majesty’s dominions.

Sec. 2.—Not to give effect to marriages unless parties are competent to contract marriage.

MERCHANT SHIPPING AND MERCHANT SEAMEN.

“An Act to amend and consolidate the Acts relating to ^{7 & 8 Vic. Cap. 112.} merchant seamen; and for keeping a register of seamen.”
—(Passed 5th September, 1844).

“An Act to amend and consolidate the Acts relating to ^{17 & 18 Vic. Cap. 104.} merchant shipping.”—(10th August, 1854).

“An Act to repeal certain Acts and parts of Acts relating ^{17 & 18 Vic. Cap. 120.} to merchant shipping, and to continue certain provisos in the said Acts.”—(11th August, 1854).

Colonial Lighthouses.—“An Act to facilitate the erection ^{18 & 19 Vic. Cap. 91.} and maintenance of colonial lighthouses, and otherwise to amend the Merchant Shipping Act, 1854.”—(14th August, 1855).

Whereas, it is expedient to make provision for facilitating the erection and maintenance of lighthouses in the British possessions abroad, and otherwise to amend the Merchant Shipping Act, 1854, be it therefore enacted, etc.

Sec. 1.—This Act may be cited as the Merchant Shipping Amendment Act, 1855, and shall be taken to be part of the Merchant Shipping Act, 1854, and shall be construed accordingly.

Sec. 2.—In any case in which any lighthouse, buoy or beacon, has been, or is hereafter erected or placed on or near the coasts of any British possession, by or with the consent of the legislative authority of such possession, Her Majesty may, by Order in Council, fix such dues in respect thereof, to be paid by the owner or master of every ship which passes the same or derives benefit therefrom, as Her Majesty may deem reasonable, and may, in like manner, from time to time, increase, diminish, or repeal such dues, and from the time specified in such order for the commencement of the dues thereby fixed, increased, or diminished, the same shall be leviable throughout Her Majesty's dominions in manner hereinafter mentioned.

Sec. 3.—No such dues as aforesaid shall be levied in any colony, unless and until the legislative authority in such colony has either, by address to the Crown, or by an Act or

ordinance duly passed, signified its opinion that the same ought to be levied in such colony.

Sec. 4.—Dues to be collected in British possessions abroad by such person as the governor may appoint for the purpose, and in manner, as far as circumstances will permit, as directed in Merchant Shipping Act, 1854, or as legislative authority in such possession may direct.

Sec. 5.—Dues to be paid over to Her Majesty's Paymaster General.

Sec. 6.—Dues to be applied to expenses of lighthouse, etc., for which they are levied.

Sec. 7.—Power to Board of Trade to borrow money on security of dues.

Sec. 8.—Accounts for each lighthouse, etc., in British possessions abroad to be kept and laid before Imperial Parliament, and to be audited.

From section nine to fifteen inclusive, refer to "Registry of Ships."

From sixteen to eighteen inclusive, "Masters and Seamen."

From nineteen to twenty inclusive, "Casualty and Salvage."

Legal procedure, jurisdiction, in case of offences on board ship, etc. Sec. 21.—If any person being a British subject charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port or harbor, or if any person not being a British subject charged with having committed any crime or offence on board any British ship on the high seas, is found within the jurisdiction of any Court of Justice in Her Majesty's dominions, which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such Court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits; provided that nothing contained in this section shall be construed to alter or interfere with the Act of the thirteenth year of her present Majesty, chapter ninety-six.

Sections 22 and 23.—"As to Lascars, and contracts made with natives in India."

Sec. 24.—Nothing herein contained shall be deemed to repeal or affect any provisions contained in the 25th, 26th, 27th, 28th, 29th, 30th, 31st and 34th sections of the Act of the fourth year of King George the Fourth, chapter 80, or in the 16th section of the Act of the 18th year of her present Majesty, chapter 120.

Memo.—Acts above referred to.

4 Geo. IV., Cap. 80.—“An Act to consolidate and amend the several laws now in force with respect to trade from and to places within the limits of the charter of the East India Company, and to make further provisions with respect to such trade, and to amend an Act of the present session of parliament for the registering of vessels, so far as it relates to vessels registered in India.”—(Passed 18th July, 1823). Refers wholly to India.

17 and 18 Vic., Cap. 120. Title: “An Act to repeal certain Acts and parts of Acts relating to merchant shipping, and to continue certain provisos in the said Acts.”—(Passed 11th August, 1854).

Sec. 16.—If native of Asia, Africa, or of any of the islands of the South Sea or Pacific Ocean, or of any other country, not having any consul in the United Kingdom, is brought to the United Kingdom in any ship, British or foreign, and is left there in distress, etc., master, owner or consignee to incur penalty of not more than £30, unless it can be shown he left without consent, etc.

Title: “An Act to amend the Merchant Shipping Act, 1854”; “The Merchant Shipping Act Amendment Act, 1855”; and the “Customs Consolidation Act, 1853.”—(Passed 29th July, 1862).

NAVAL DEFENCE OF THE COLONIES.

“An Act to make better provision for the naval defence of the colonies.”—(7th April, 1865).

Short Title: “The Colonial Naval Defence Act, 1865.”

Sec. 3.—Empowers legislatures of colonies to provide vessels and raise men and commission officers, etc.

Sec. 4.—Volunteers to form part of Royal Naval Reserve.

Sec. 5.—Power to Admiralty to issue special commissions.

Sec. 6.—Her Majesty may, from time to time, as occasion requires, authorize Admiralty to accept any offer for the time being made by the governor of a colony, to place at Her Majesty's disposal colonial vessels with men and officers, etc. Vessels for time being, and men and officers, deemed of the Royal Navy.

Sec. 7.—Authorized to accept services of volunteers and officers in navy.

Sec. 10.—Nothing in this Act to affect powers vested in colonies.

OFFENDERS ESCAPING FROM COLONIES.

6 & 7 Vic. Cap.
84.

“An Act for the apprehension of certain offenders.”—
(28th July, 1843),

Offenders in the
Colonies escap-
ing into the
United
Kingdom may
be there appre-
hended.

Whereas, it is expedient to make more effectual provision for the apprehension and trial of offenders against the laws, who may be in other parts of Her Majesty's dominions than those in which their offences were committed: Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this Act, if any person charged with having committed any offence such as is hereinafter mentioned, against the laws of any part of Her Majesty's dominions not being part of the United Kingdom of Great Britain and Ireland, and against whom a warrant shall have been issued for such offence, by any person having lawful authority to issue the same within that part of Her Majesty's dominions where such offence shall have been committed, shall be in any place within the said United Kingdom, it shall be lawful in Great Britain for one of Her Majesty's principal Secretaries of State, and in Ireland, for the Chief Secretary of the Lord Lieutenant of Ireland, to endorse his name on such warrant, which warrant so endorsed shall be a sufficient authority to the person or persons bringing such warrant, and to all

persons to whom such warrant was originally directed, and also to all constables and other peace officers in that part of the United Kingdom where the said warrant shall be so endorsed, to execute the said warrant, by apprehending the person against whom such warrant is directed, and to convey the said person before a justice of the peace for the county or other jurisdiction in which the supposed offender shall be apprehended, or in Scotland, either before such justice of the peace or before the sheriff's deputy or substitute.

Sec. 2.—And to remedy the like failure of justice, by the escape of persons charged with having committed offences into those parts of Her Majesty's dominions which do not form part of the said United Kingdom: Be it enacted, that from and after the passing of this Act, if any person charged with having committed any offence, such as is hereinafter mentioned, in any part of Her Majesty's dominions, whether or not within the said United Kingdom, and against whom a warrant shall be issued by any person or persons having lawful authority to issue the same, shall be in any other part of Her Majesty's dominions not forming part of the said United Kingdom, it shall be lawful for the chief justice or any other judge of Her Majesty's Superior Court of Law within that other part of Her Majesty's dominions where such person shall be, to endorse his name on such warrant, which warrant so endorsed shall be a sufficient authority to the person or persons bringing such warrant, and also to all persons to whom such warrant was originally directed, and also to all peace officers of the place where the warrant shall be so endorsed, to execute the same within the jurisdiction of the person by whom it shall be so endorsed, by apprehending the person against whom such warrant is directed, and to convey him before a magistrate or other person having authority to examine and commit offenders for trial in that part of Her Majesty's dominions.

For apprehension of offenders escaping into the Colonies.

Sec. 3.—And be it enacted, that it shall be lawful for any person duly authorized to examine and commit offenders for trial, before whom any such supposed offender shall be

Offender may be committed to jail until he can be sent back to the place where the offence was committed.

Information of
Committal to be
given.

brought as aforesaid, upon such evidence of criminality as would justify his committal if the offence had been committed in that part of Her Majesty's dominions, to commit such supposed offender to prison, there to remain until he can be sent back, in manner hereinafter mentioned, to that part of Her Majesty's dominions in which he is charged with having committed such offence; and immediately upon the committal of such person, information thereof in writing under the hand of the committing magistrate, accompanied by a copy of the said warrant, shall be given, in Great Britain, to one of Her Majesty's principal Secretaries of State, and in Ireland, to the Chief Secretary of the Lord Lieutenant, and in any other part of Her Majesty's dominions, to the Governor or acting Governor.

Copies of depositions
may be
given as evidence.

Sec. 4.—Provided always, and be it enacted, that in every such case copies of the depositions upon which the original warrant was granted, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended.

Offenders apprehended to be
sent to the place
where the
offence was
committed.

Sec. 5.—And be it enacted, that it shall be lawful, in Great Britain, for any one of Her Majesty's principal Secretaries of State, and in Ireland, for the Chief Secretary of the Lord Lieutenant, and in any other part of Her Majesty's dominions, for the Governor or acting Governor, by warrant under his hand and seal, to order any person who shall have been so apprehended and committed to jail to be delivered into the custody of some person or persons, to be named in the said warrant, for the purpose of being conveyed into that part of Her Majesty's dominions in which he is charged with having committed the offence, and being delivered into the custody of the proper authorities, there to be dealt with in due course of law, as if he had been there apprehended, and to order that the person so committed to jail be so conveyed accordingly; and if the said person, after he shall have been so apprehended, shall escape out of any custody to which he shall have been committed as aforesaid, it shall

be lawful to retake such person in the same manner as any person accused of any crime against the laws of that part of Her Majesty's dominions may be retaken upon an escape.

Sec. 6.—And be it enacted, that where any person who shall have been committed to jail under this Act shall not be conveyed out of that part of Her Majesty's dominions in which he shall have been so committed to jail within two calendar months after such committal, over and above the time actually required to convey the prisoner from the jail to which he was committed by the readiest way out of that part of Her Majesty's dominions, it shall be lawful for any of Her Majesty's judges in that part of Her Majesty's dominions in which such supposed offender shall be in custody, upon application made to him or them by or on behalf of the person so committed, and upon proof made to him or them that reasonable notice of the intention to make such application has been given to one of Her Majesty's principal Secretaries of State in Great Britain, or in Ireland to the Chief Secretary of the Lord Lieutenant of Ireland, or to the Governor or acting Governor in any other part of Her Majesty's dominions, to order the person so committed to be discharged out of custody, unless sufficient cause shall be shewn to such judge or judges why such discharge ought not to be ordered.

Sec. 7.—And be it enacted, that in case any person apprehended under this Act shall not be indicted for the offence for which he shall have been so apprehended within the period of six calendar months after his arrival in that part of Her Majesty's dominions in which he is charged to have committed the offence, or, if upon his trial he shall be acquitted, it shall be lawful in Great Britain for one of Her Majesty's principal Secretaries of State, and in Ireland for the Chief Secretary of the Lord Lieutenant of Ireland, and for the Governor or acting Governor in any other part of Her Majesty's dominions, if he shall think fit, upon the request of the person so apprehended, to cause such person to be sent back, free of cost to such person, and with as little delay as possible, to that part of Her Majesty's dominions in which he shall have been so apprehended.

If not sent within two months after committal may apply to be discharged.

Persons apprehended if not indicted within six months or if not convicted may be sent back.

Providing for
expense of re-
moval of offen-
ders to the
United
Kingdom.

Sec. 8.—And be it enacted, that the Court before which any person apprehended under this Act shall be prosecuted or tried within the said United Kingdom may order, if it shall think fit, that the expenses of apprehending and removing the prisoner from any part of Her Majesty's dominions not within the said United Kingdom, shall be repaid to the person defraying the same by the treasurer of the county, or other jurisdiction in England or Ireland, or by the sheriff's deputy or substitute of the county in Scotland, in which the offence is charged to have been committed, the amount of such expenses being previously ascertained by an account thereof verified by production of proper vouchers before two justices of the peace of such county or other jurisdiction, which last mentioned justices shall examine into the correctness of the said account, and shall allow the same, or such part thereof, as shall to them appear just and reasonable, under their hands and seals; and every treasurer or sheriff, deputy or substitute, who shall pay the amount so ascertained, shall be allowed such payment in his accounts respecting the business of such county or other jurisdiction.

Proof of signa-
ture of the per-
son issuing the
original
warrant.

Sec. 9.—Provided always, and be it enacted, that it shall not be lawful for any person to endorse his name on any such warrant for the purpose of authorizing the apprehension of any person under this Act, until it shall have been proved to him, upon oath or by affidavit, that the seal or signature upon the same is the seal or signature of the person having lawful authority to issue such warrant, whose seal or signature the same purports to be.

Warrant not to
be endorsed ex-
cept in cases of
Treason, Felony
etc.

Sec. 10.—Provided also, and be it enacted, that it shall not be lawful for any person to endorse his name upon any such warrant for the purpose of authorizing the apprehension of any person under the Act, unless it shall appear upon the face of the said warrant that the offence which the person for whose apprehension the said warrant has been issued is charged to have committed is such that, if committed within that part of Her Majesty's dominions where the warrant is so endorsed, it would have amounted in law to a treason or some felony, such as the justices of the peace in

General or Quarter Sessions assembled have not authority to try in England under the provisions of an Act passed in the sixth year of the reign of Her Majesty, intituled "An Act to define the jurisdiction of justices in General and Quarter Sessions of the Peace," or unless the depositions appear sufficient to warrant the committal of such person for trial.

Sec. 11.—And be it enacted, that this Act may be amend-^{Act may be amended.}
ed or repealed by any Act to be passed in this session of
parliament.

24 VICT. CAP. 10.

ADMIRALTY COURT ACT, 1861.

An Act to extend the Jurisdiction and improve the Practice of the High Court of Admiralty.

17TH MAY, 1861.

WHEREAS it is expedient to extend the jurisdiction and improve the practice of the High Court of Admiralty of England: be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present parliament assembled, and by the authority of the same, as follows:

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| Short title. | 1. This Act may be cited for all purposes as "The Admiralty Court Act, 1861." |
| Interpretation of terms. | 2. In the interpretation and for the purposes of this Act (if not inconsistent with the context or subject) the following terms shall have the respective meanings hereinafter assigned to them; that is to say: "Ship" shall include any description of vessel used in navigation not propelled by oars; "Cause" shall include any cause, suit, action, or other proceeding in the Court of Admiralty. |
| Commencement of Act. | 3. This Act shall come into operation on the first day of June one thousand eight hundred and sixty-one. |
| As to claims for building, equipping, or repairing of ships. | 4. The High Court of Admiralty shall have jurisdiction over any claim for the building, equipping or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the Court. |
| As to claims for necessaries. | 5. The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales; provided always, that if in any such cause the plaintiff do not recover twenty pounds, |

he shall not be entitled to any costs, charges or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said Court.

6. The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales; provided always, that if in any such cause the plaintiff do not recover twenty pounds, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said Court.

As to claims for damage to cargo imported.

7. The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.

As to claims for damage by any ship.

8. The High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship registered at any port in England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship or any share thereof to be sold, and may make such order in the premises as to it shall seem fit.

High Court of Admiralty to decide questions as to ownership, etc., of ships.

9. All the provisions of "The Merchant Shipping Act, 1854," in regard to salvage of life from any ship or boat within the limits of the United Kingdom, shall be extended to the salvage of life from any British ship or boat, where-soever the services may have been rendered, and from any foreign ship or boat, where the services have been rendered either wholly or in part in British waters.

Extending 17 & 18 Vict. c. 104, as to claims for salvage of life.

10. The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under

As to claims for wages and for disbursements by master of a ship.

a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship: provided always, that if in any such cause the plaintiff do not recover fifty pounds, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said Court

3 & 4 Vict. c. 85,
in regard to
mortgages ex-
tended to Court
of Admiralty.

11. The High Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of "The Merchant Shipping Act, 1854," whether the ship or the proceeds thereof be under arrest of the said Court or not.

Sections 62 to 65
of 17 & 18 Vict.
c. 104, extended
to Court of
Admiralty.

12. The High Court of Admiralty shall have the same powers over any British ship, or any share therein, as are conferred upon the High Court of Chancery in England by the 62nd, 63rd, 64th and 65th sections of "The Merchant Shipping Act, 1854."

Part 9 of 17 &
18 Vict. c. 104,
extended to
Court of Admi-
ralty.

13. Whenever any ship or vessel, or the proceeds thereof, are under arrest of the High Court of Admiralty, the said Court shall have the same powers as are conferred upon the High Court of Chancery in England by the ninth part of "The Merchant Shipping Act, 1854."

Court to be a
Court of Record.

14. The High Court of Admiralty shall be a Court of Record for all intents and purposes.

Decrees and
orders of Court
of Admiralty
to have effect of
judgments at
common law.

15. All decrees and orders of the High Court of Admiralty, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the same effect as judgments in the Superior Courts of Common Law, and the persons to whom any such moneys, or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors, and all powers of enforcing judgments possessed by the Superior Courts of Common Law, or any judge thereof, with respect to matters depending in the same Courts, as well against the ships and goods arrested as against the person of the judgment debtor, shall be possessed by the said Court of Admiralty with respect to matters therein depending; and all remedies at common

law possessed by judgment creditors shall be in like manner possessed by persons to whom any moneys, costs, charges, or expenses, are by such orders or decrees of the said Court of Admiralty directed to be paid.

16. If any claim shall be made to any goods or chattels taken in execution under any process of the High Court of Admiralty, or in respect of the seizure thereof, or any Act or matter connected therewith, or in respect of the proceeds or value of any such goods or chattels, by any landlord for rent, or by any person not being the party against whom the process has issued, the registrar of the said Court may, upon application of the officer charged with the execution of the process, whether before or after any action brought against such officer, issue a summons calling before the said Court both the party issuing such process and the party making the claim, and thereupon any action which shall have been brought in any of Her Majesty's Superior Courts of Record, or in any local or inferior Court, in respect of such claim, seizure, act, or matter as aforesaid, shall be stayed, and the Court in which such action shall have been brought, or any judge thereof, on proof of the issue of such summons, and that the goods and chattels were so taken in execution, may order the party bringing the action to pay the costs of all proceedings had upon the action after issue of the summons out of the said Admiralty Court, and the judge of the said Admiralty Court shall adjudicate upon the claim, and make such order between the parties in respect thereof and of the costs of the proceedings, as to him shall seem fit, and such order shall be enforced in like manner as any order made in any suit brought in the said Court. Where any such claim shall be made as aforesaid the claimant may deposit with the officer charged with the execution of the process either the amount or value of the goods claimed, the value to be fixed by appraisement in case of dispute, to be by the officer paid into Court to abide the decision of the judge upon the claim, or the sum which the officer shall be allowed to charge as costs for keeping possession of the goods until such decision can be obtained, and in default of the claimant so doing the officer may sell the goods as if no such claim

As to claims to goods taken in execution.

had been made, and shall pay into Court the proceeds of the sale, to abide the decision of the judge.

Powers of Superior Courts extended to Court of Admiralty.

17. The judge of the High Court of Admiralty shall have all such powers as are possessed by any of the Superior Courts of Common Law or any judge thereof to compel either party in any cause or matter to answer interrogatories, and to enforce the production, inspection, and delivery of copies of any document in his possession or power.

Party in Court of Admiralty may apply for an order for inspection by Trinity master.

18. Any party in a cause in the High Court of Admiralty shall be at liberty to apply to the said Court for an order for the inspection by the Trinity masters or others appointed for the trial of the said cause, or by the party himself or his witnesses, of any ship or other personal or real property, the inspection of which may be material to the issue of the cause, and the Court may make such order in respect of the costs arising thereout as to it shall seem fit.

Admission of documents.

19. Any party in a cause in the High Court of Admiralty may call on any other party in the cause by notice in writing to admit any document, saving all just exceptions, and in case of refusal or neglect to admit, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial the judge shall certify that the refusal to admit was reasonable.

Power to Court of Admiralty when personal service of citation has not been effected to order parties to proceed.

20. Whenever it shall be made to appear to the judge of the High Court of Admiralty that reasonable efforts have been made to effect personal service of any citation, monition, or other process issued under seal of the said Court, and either that the same has come to the knowledge of the party thereby cited or monished, or that he wilfully evades service of the same, and has not appeared thereto, the said judge may order that the party on whose behalf the citation, monition, or other process was issued be at liberty to proceed as if personal service had been effected, subject to such conditions as to the judge may seem fit, and all proceedings thereon shall be as effectual as if personal service of such citation, monition, or other process had been effected.

21. The service in any part of Great Britain or Ireland of any writ of *subpœna ad testificandum* or *subpœna duces tecum*, issued under seal of the High Court of Admiralty, shall be as effectual as if the same had been served in England or Wales.

As to the service of subpœna out of England and Wales.

22. Any new writ or other process necessary or expedient for giving effect to any of the provisions of this Act may be issued from the High Court of Admiralty in such form as the judge of the said Court shall from time to time direct.

Power to issue new writs or other process.

23. All the powers possessed by any of the Superior Courts of Common Law or any judge thereof, under the Common Law Procedure Act, 1854, and otherwise, with regard to references to arbitration, proceedings thereon, and the enforcing of awards of arbitrators, shall be possessed by the judge of the High Court of Admiralty in all causes and matters depending in the said Court, and the registrar of the said Court of Admiralty shall possess as to such matters the same powers as are possessed by the masters of the said Superior Courts of Common Law in relation thereto.

Judge and registrar to have same power as to arbitration as judges and masters at common law.

24. The registrar of the High Court of Admiralty shall have the same powers under the fifteenth section of the Merchant Shipping Act, 1854, as are by the said section conferred on the masters of Her Majesty's Court of Queen's Bench in England and Ireland.

Section 15 of 17 & 18 Vic. c. 104, extended to registrar of Court of Admiralty.

25. The registrar of the High Court of Admiralty may exercise, with reference to causes and matters in the said Court, the same powers as any surrogate of the judge of the said Court sitting in chambers might or could have heretofore lawfully exercised; and all powers and authorities by this or any other Act conferred upon or vested in the registrar of the said High Court of Admiralty may be exercised by any deputy or assistant registrar of the said Court.

Powers of registrar and of deputy or assistant registrar.

26. The registrar of the said Court of Admiralty shall have power to administer oaths in relation to any cause or matter depending in the said Court; and any person who shall wilfully depose or affirm falsely in any proceeding before the registrar or before any deputy or assistant registrar of the said Court, or before any person authorized to ad-

False oath or affirmation deemed perjury.

minister oaths in the said Court, shall be deemed to be guilty of perjury, and shall be liable to all the pains and penalties attaching to wilful and corrupt perjury.

Appointment of registrar and of deputy or assistant registrar.

27. Any advocate, barrister-at-law, proctor, attorney, or solicitor of ten years' standing may be appointed registrar or assistant or deputy registrar of the said Court.

Appointment of examiners.

28. Any advocate, barrister-at-law, proctor, attorney, or solicitor may be appointed an examiner of the High Court of Admiralty.

Stamp duty not payable on subsequent admissions of proctors or solicitors.

29. Any person who shall have paid on his admission in any Court as a proctor, solicitor, or attorney the full stamp duty of twenty-five pounds, and who has been or shall hereafter be admitted a proctor, solicitor, or attorney (if in other respects entitled to be so admitted), shall be liable to no further stamp duty in respect of such subsequent admission.

Proctor may act as agent of solicitors.

30. Any proctor of the High Court of Admiralty may act as agent of any attorney or solicitor, and allow him to participate in the profits of and incident to any cause or matter depending in or connected with the said Court; and nothing contained in the Act of the fifty-fifth year of the reign of King George III., chapter 160, shall be construed to extend to prevent any proctor from so doing, or to render him liable to any penalty in respect thereof.

2 Hen. 4, c. 11, repealed.

31. The Act passed in the second year of the reign of King Henry IV., intituled "A Remedy for Him who is Wrongfully Pursued in the Court of Admiralty," is hereby repealed.

Power of appeal in interlocutory matters.

32. Any party aggrieved by any order or decree of the Judge of the said Court of Admiralty, whether made *ex parte* or otherwise, may, with the permission of the judge, appeal therefrom to Her Majesty in Council, as fully and effectually as from any final decrees or sentence of the said Court.

Bail given in the Court of Admiralty good in the Court of Appeal.

33. In any cause in the High Court of Admiralty bail may be taken to answer the judgment as well of the said Court as of the Court of Appeal, and the said High Court of Admiralty may withhold the release of any property under its arrest until such bail has been given; and in any

appeal from any decree or order of the High Court of Admiralty, the Court of Appeal may make and enforce its order against the surety or sureties who may have signed any such bail bond in the same manner as if the bail had been given in the Court of Appeal.

34. The High Court of Admiralty may, on the application of the defendant in any cause of damage, and on his instituting a cross cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross cause be heard at the same time and upon the same evidence; and if in the principal cause the ship of the defendant has been arrested, or security given by him to answer judgment, and in the cross cause the ship of the plaintiff cannot be arrested, and security has not been given to answer judgment therein, the Court may, if it think fit, suspend the proceedings in the principal cause until security has been given to answer judgment in the cross cause.

35. The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings *in rem* or by proceedings *in personam*.

As to the hearing of causes and cross causes.

Jurisdiction of the Court.

26 & 27 VICT. CAP. 24.

VICE-ADMIRALTY COURTS ACT, 1863.

An Act to facilitate the Appointment of Vice-Admirals and of Officers in Vice-Admiralty Courts in Her Majesty's Possessions abroad, and to confirm the past Proceedings, to extend the Jurisdiction, and to amend the Practice of those Courts.

8TH JUNE, 1863.

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| Short title. | 1. This Act may be cited for all purposes as the "Vice-Admiralty Courts Act, 1863." |
| Interpretation of terms. | <p>"Vice-Admiralty Court" shall mean any of the existing Vice-Admiralty Courts enumerated in the schedule marked A hereto annexed, or any Vice-Admiralty Court which shall hereafter be established in any British possession;</p> <p>"Ship" shall include every description of vessel used in navigation not propelled by oars only, whether British or foreign;</p> <p>"Cause" shall include any cause, suit, action or other proceeding instituted in any Vice-Admiralty Court.</p> |
| Saving the powers of the Admiralty. | 7. Nothing in this Act contained shall be taken to affect the power of the Admiralty to appoint any vice-admiral, or any judge, registrar, marshal, or other officer of any Vice-Admiralty Court, as heretofore, by warrant from the Admiralty, and by letters patent issued under seal of the High Court of Admiralty of England. |
| Jurisdiction of Vice-Admiralty Courts. | <p>10. The matters in respect of which the Vice-Admiralty Courts shall have jurisdiction are as follow :</p> <ol style="list-style-type: none"> (1) Claims for seamen's wages; (2) Claims for master's wages, and for his disbursements on account of the ship; (3) Claims in respect of pilotage; (4) Claims in respect of salvage of any ship, or of life or goods therefrom; (5) Claims in respect of towage; |

- (6) Claims for damage done by any ship;
- (7) Claims in respect of bottomry or respondentia bonds;
- (8) Claims in respect of any mortgage where the ship has been sold by a decree of the Vice-Admiralty Court, and the proceeds are under its control;
- (9) Claims between the owners of any ship registered in the possession in which the Court is established, touching the ownership, possession, employment, or earnings of such ship;
- (10) Claims for necessities supplied, in the possession in which the Court is established, to any ship of which no owner or part-owner is domiciled within the possession at the time of the necessities being supplied.
- (11) Claims in respect of the building, equipping, or repairing within any British possession of any ship of which no owner or part-owner is domiciled within the possession at the time of the work being done.

11. The Vice-Admiralty Courts shall also have jurisdiction — Jurisdiction of Vice-Admiralty Courts.

- (1) In all cases of breach of the regulations and instructions relating to Her Majesty's navy at sea;
- (2) In all matters arising out of droits of Admiralty.

12. Nothing contained in this Act shall be construed to take away or restrict the jurisdiction conferred upon any Vice-Admiralty Court by any Act of Parliament in respect of seizures for breach of the revenue, customs, trade, or navigation laws, or of the laws relating to the abolition of the slave trade, or to the capture and destruction of pirates and piratical vessels, or any other jurisdiction now lawfully exercised by any such Court, or any jurisdiction now lawfully exercised by any other Court within Her Majesty's dominions (1). Nothing to restrict existing jurisdictions.

13. The jurisdiction of the Vice-Admiralty Courts, except where it is expressly confined by this Act to matters arising within the possession in which the Court is established — As to matters arising beyond limits of colony.

(1) See Appellate Jurisdiction, 1876, 39 & 40 Vict., c. 59, s. 23.

lished, may be exercised, whether the cause or right of action has arisen within or beyond the limits of such possession.

Her Majesty
empowered to
establish and
alter rules and
tables of fees.

14. Her Majesty may, by Order in Council, from time to time, establish rules touching the practice to be observed in the Vice-Admiralty Courts, as also tables of the fees to be taken by the officers and practitioners thereof for all acts to be done therein, and may repeal and alter the existing and all future rules and tables of fees, and establish new rules and tables of fees in addition thereto, or in lieu thereof.

Rules and tables
of fees to be laid
before the
House of Com-
mons.

15. A copy of any rules or tables of fees which may at any time be established shall be laid before the House of Commons within three months from the establishing thereof, or if parliament shall not be then sitting, or if the session shall terminate within one month from that date, then within one month after the commencement of the next session.

To be entered in
the records of
the Courts.

16. The rules and tables of fees in force in any Vice-Admiralty Court shall, as soon as possible after they have been received in the British possession in which the Court is established, be entered by the registrar in the public books or records of the Court, and the books or records in which they are so entered shall at all reasonable times be open to the inspection of the practitioners and suitors in the Court.

To be hung up
in Court, etc.

17. A copy of the rules and tables of fees in force in any Vice-Admiralty Court shall be kept constantly hung up in some conspicuous place as well in the Court as in the office of the registrar.

Established fees
to be the only
fees taken.

18. The fees established for any Vice-Admiralty Court shall, after the date fixed for them to come into operation, be the only fees which shall be taken by the officers and practitioners of the Court.

Taxation may
be revised by
the High Court
of Admiralty.

19. Any person who shall feel himself aggrieved by the charges of any of the practitioners in any Vice-Admiralty Court, or by the taxation thereof by the officers of the Court, may apply to the High Court of Admiralty of England to have the charges taxed, or the taxation thereof revised.

20. The registrar of any Vice-Admiralty Court shall have power to administer oaths in relation to any matter depending in the Court; and any person who shall wilfully swear falsely in any proceeding before the registrar, or before any other person authorized to administer oaths in the Court, shall be deemed guilty of perjury, and shall be liable to all the penalties attaching to wilful and corrupt perjury.

Registrar may administer oaths.

21. If a cause of damage by collision be instituted in any Vice-Admiralty Court, and the defendant institute a cross cause in respect of the same collision, the judge may, on application of either party, direct both causes to be heard at the same time and on the same evidence; and if the ship of the defendant in one of the causes has been arrested, or security given by him to answer judgment, but the ship of the defendant in the other cause cannot be arrested, and security has not been given to answer judgment therein, the Court may, if it think fit, suspend the proceedings in the former cause until security has been given to answer judgment in the latter cause.

As to the hearing of cross causes.

22. The appeal from a decree or order of a Vice-Admiralty Court lies to Her Majesty in Council; but no appeal shall be allowed, save by permission of the judge, from any decree or order not having the force or effect of a definitive sentence or final order.

No appeal save from final sentence or order.

23. The time for appealing from any decree or order of a Vice-Admiralty Court shall, notwithstanding any existing enactment to the contrary, be limited to six months from the date of the decree or order appealed from; and no appeal shall be allowed where the petition of appeal to Her Majesty shall not have been lodged in the registry of the High Court of Admiralty and of appeals within that time, unless Her Majesty in Council shall, on the report and recommendation of the Judicial Committee of the Privy Council, be pleased to allow the appeal to be prosecuted, notwithstanding that the petition of appeal has not been lodged within the time prescribed.

Appeal to be made within six months.

24. The Acts enumerated in the schedule hereto annexed marked B are hereby repealed, to the extent therein men-

Acts repealed. Saving rules established under 2 & 3 W. 4, c. 51.

VICE-ADMIRALTY REPORTS.

tioned, but the repeal thereof shall not affect the validity of any rules, orders, regulations, or tables of fees heretofore established and now in force, in pursuance of the Act of 2 & 3 William IV. c. 51; but such rules, orders, regulations, and tables of fees shall continue in force until repealed or altered under the provisions of this Act.

SCHEDULE B.

ACTS AND PARTS OF ACTS REPEALED.

| Reference to Act. | Title of Act. | Extent of Repeal. |
|------------------------|--|--|
| 56 Geo. III. c. 82. | An Act to render valid the Judicial Acts of Surrogates of Vice-Admiralty Courts abroad, during vacancies in office of judges of such Courts. | The whole Act, save as regards Her Majesty's possessions in India. |
| 5 Geo. IV. c. 113. | An Act to amend and consolidate the laws relating to the abolition of the slave trade. | Section 29, save as above. |
| 2 & 3 Will. IV. c. 51. | An Act to regulate the practice and fees in the Vice-Admiralty Courts abroad, and to obviate doubts as to their jurisdiction. | The whole Act, save as above. |
| 6 & 7 Vict. c. 38. | An Act to make further regulations for facilitating the hearing appeals and other matters by the Judicial Committee of the Privy Council. | Section 11, so far as it relates to Appeals from Vice-Admiralty Courts, save as above. |
| 17 & 18 Vict. c. 37. | An Act for establishing the validity of certain proceedings in Her Majesty's Court of Vice-Admiralty in Mauritius. | The whole Act. |

R. S. CAN. CAP. 74.

An Act respecting the Shipping of Seamen.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :

SHORT TITLE.

1. This Act may be cited as "The Seamen's Act." 36 Short title.
 Vict. c. 129, s. 1.

INTERPRETATION.

2. In this Act, unless the context otherwise requires— Interpretation.

(a) The expression "the said provinces" means the provinces of Quebec, Nova Scotia, New Brunswick, Prince Edward Island and British Columbia; "The said Provinces."

(b) The expression "ship" includes every description of "Ship." vessel used in navigation not propelled by oars;

(c) The expression "ships belonging to Her Majesty" "Ships belonging to Her Majesty." includes ships the cost of which has been defrayed out of the Consolidated Revenue Fund of Canada, and ships described as the property of Canada, by the one hundred and eighth section of "The British North America Act, 1867";

(d) The expression "Canadian foreign sea-going ship" "Canadian foreign sea-going ship." includes every ship registered in any of the said provinces, employed in trading or going by sea between some place or places in Canada and some place or places out of Canada;

(e) The expression "Canadian home-trade ship" "Canadian home-trade ship." includes every ship registered in either of the said provinces, employed in trading or going from any place or places in any of the said provinces to any other place or places in any other of the said provinces;

(f) The expression "master" includes every person (except a pilot) having command or charge of a ship; "Master."

(g) The expression "seaman" includes every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship; "Seaman."

"Consular officer."

(h) The expression "Consular officer" includes Consul General, Consul and Vice-Consul, and any person for the time being discharging the duties of Consul General, Consul or Vice-Consul;

"The Board of Trade."

(i) The expression "the Board of Trade" means the Lords of the Committee of Privy Council appointed for the consideration of matters relating to trade and foreign plantations;

"The Minister."

(j) The expression "the Minister" means the Minister of Marine and Fisheries. 36 Vict., c. 129, s. 3.

APPLICATION OF ACT.

Application of Act.

3. This Act applies only to the Provinces of Quebec, Nova Scotia, New Brunswick, Prince Edward Island and British Columbia. 36 Vict., c. 129, s. 2.

Limitation.

4. This Act shall not, except as hereinafter specially provided, apply to ships belonging to Her Majesty. 36 Vict., c. 129, s. 6.

ALLOTMENT OF WAGES.

Rules as to allotment notes.

37. All stipulations for the allotment of any part of the wages of a seaman during his absence, which are made at the commencement of the voyage, shall be inserted in the agreement, and shall state the amounts and times of payments to be made; and allotment notes may be in the form B in the schedule hereto. 36 Vict., c. 129, s. 37.

Allotment notes may be sued on summarily by certain persons and under certain conditions.

38. The wife, or the father or mother, or the grandfather or grandmother, or any child or grandchild, or any brother or sister, of any seaman in whose favor an allotment note of part of the wages of such seaman is made, may, unless the seaman is shown in manner hereinafter mentioned to have forfeited or ceased to be entitled to the wages out of which the allotment is to be paid, and subject as to the wife, to the provision hereinafter contained, sue for and recover the sums allotted by the note when and as the same are made payable, with costs from the owner or any agent who has authorized the drawing of the note,—either in the summary manner in which seamen are, by this Act, enabled to sue for and recover wages not exceeding two hundred dollars, or in any Court in any of the said provinces having

jurisdiction to the amount, within the limits of whose jurisdiction such owner or agent has been served with process, or the agreement and allotment note or either of them were or was made,—such owner or agent having been duly served with process in any place in any of the said provinces within or without such limits:

(2) In any such proceeding it shall be sufficient for the Proof. claimant to prove that he or she is the person mentioned in the note, and that the note was given by the owner or by the master or some authorized agent; and the seaman shall be presumed to be duly earning his wages, unless the contrary is shown to the satisfaction of the Court, either by the official statement of the change in the crew caused by his absence made and signed by the master, as by this Act is required, or by a duly certified copy of some entry in the log-book to the effect that he has left the ship, or by a credible letter from the master of the ship to the same effect, or by such other evidence, of whatever description, as the Court in its absolute discretion considers sufficient to show satisfactorily that the seaman has ceased to be entitled to the wages out of which the allotment is to be paid.

(3) The wife of any seaman who deserts her children, or As to misconduct of wife. so misconducts herself as to be undeserving of support from her husband, shall thereupon forfeit all right to further payments of any allotment of his wages which has been made in her favor.

(4) Every master who makes a wilfully false statement in Penalty for wilfully false statement. any such letter, as is in this section mentioned, shall incur a penalty of one hundred dollars. 36 Vict. c. 129, s. 38.

DISCHARGE AND PAYMENT OF WAGES.

39. All seamen discharged in any of the said provinces, Discharges to be made before shipping master from ships registered in any of the said provinces other than Canadian home-trade ships, shall be discharged and receive their wages in the presence of the shipping master duly appointed under this Act, except in cases where some Exceptions. competent Court otherwise directs; and any master or owner or consignee of any ship registered in any of the said provinces, not being a Canadian home-trade ship, who discharges any

seaman belonging thereto or, except as aforesaid, pays his wages within any of the said provinces in any other manner, shall incur a penalty not exceeding forty dollars; and in the case of ships exempted as aforesaid, seamen may, if the owner or master so desires, be discharged and receive their wages in like manner. 36 Vict. c. 129, s. 39.

Penalty for default.

Master to deliver account of wages.

40. Every master shall, before paying off or discharging any seaman in any of the said provinces from a ship registered in any of the said provinces, not being a Canadian home-trade ship of less than eighty tons, deliver to him, or if he is to be discharged before a shipping master, to such shipping master, a full and true account of his wages, and of all deductions to be made therefrom on any account whatsoever, and in default shall, for each offence, incur a penalty not exceeding twenty dollars; and such account may be in the form C in the schedule hereto. 36 Vict. c. 129, s. 40.

On discharge masters to give seamen certificates of discharge.

41. Upon the discharge in any of the said provinces of any seaman belonging to a ship registered in any of the said provinces, not being a Canadian home-trade ship of less than eighty tons, or upon payment of his wages, the master shall sign and give him a certificate of his discharge in the form D in the schedule hereto, specifying the period of his service and the time and place of his discharge, and shall make and sign thereon a report of the conduct, character and qualifications of the person discharged, during the period he has been in his employment; or he may state that he declines to give any opinion upon such particulars or upon any of them; and if any master fails to sign and give to any such seaman requiring the same, such certificate of discharge and report or statement as aforesaid, he shall, for each such offence, incur a penalty not exceeding forty dollars. 36 Vict. c. 129, s. 41.

Penalty for default.

Shipping master may decide questions which parties refer to him.

42. Every shipping master in Canada may hear and decide any question whatsoever between a master or owner of a ship registered in Canada and any of his crew, which both parties agree in writing to submit to him; and every award so made by him shall be binding on both parties, and shall, in any legal proceedings which are taken in the matter

before any Court of Justice in Canada, be deemed to be conclusive as to the rights of the parties; and any document purporting to be such submission or award shall be *prima facie* evidence thereof, and such shipping master may charge a fee not exceeding four dollars as remuneration therefor. 36 Vict. c. 129. s. 42.

43. In any proceeding relating to the wages, claims or discharge of any seaman belonging to any ship registered in any of the said provinces, carried on before any shipping master under the provisions of this Act, such shipping master may call upon the owner or his agent, or upon the master or any mate or other member of the crew, to produce any log-books, papers or other documents in their respective possession or power, relating to any matter in question in such proceedings, and may call before him and examine on oath on any such matter any of such persons then at or near the place; and every owner, agent, master, mate or other member of the crew, who when called upon by the shipping master does not produce any such paper or document as aforesaid, if in his possession or power, or does not appear and give evidence, shall, unless he shows a reasonable excuse for such default, incur for each such offence a penalty not exceeding twenty dollars. 36 Vict. c. 129, s. 43.

Masters and others to produce ship's papers to shipping masters and give evidence.

Penalty for default.

LEGAL RIGHTS TO WAGES.

44. In the case of ships registered in any of the said provinces, the right to wages and provisions of a seaman engaged in any of the said provinces shall be taken to commence either at the time at which he commences work, or at the time specified for his commencement of work or presence on board, whichever first happens. 36 Vict. c. 129, s. 44.

Right to wages and provisions, when to begin.

45. No seaman engaged under this Act for any ship registered in any of the said provinces, shall, by any engagement made in any of the said provinces, forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled; and every stipulation in any agreement made in any of the said provinces inconsistent with any provision of this Act,

Seamen not to forfeit certain rights.

Proviso. and every stipulation by which any seaman consents to abandon his right to wages in the case of the loss of the ship, or to abandon any right which he has or obtains in the nature of salvage, shall be wholly inoperative; but this shall not apply to the case of any stipulation made by the seamen belonging to any ship which, according to the terms of the agreement, is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services, to be rendered by such ship to any other ship. 36 Vict. c. 129, s. 45.

Wages not to depend on the earning of freight. 46. No right to wages of any seaman or apprentice on board of any ship registered in any of the said provinces shall be dependent on the earning of freight; and every such seaman or apprentice who would be entitled to demand and recover any wages if the ship in which he has served had earned freight shall, subject to all other rules of law and conditions applicable to the case, be entitled to claim and recover the same, notwithstanding that freight has not been earned; but in all cases of wreck or loss of the ship, proof that he has not exerted himself to the utmost to save the ship, cargo and stores, shall bar his claim. 36 Vict. c. 129, s. 46.

How wages are to be paid in case of death. 47. If any seaman or apprentice to whom wages are due under the next preceding section dies before the same are paid, they shall be paid and applied in the manner herein-after specified with regard to the wages of seamen who die during a voyage. 36 Vict. c. 129, s. 47.

Right to wages in case of termination of service by wreck or illness. 48. Whenever the service of any seaman belonging to any ship registered in any of the said provinces, terminates before the period contemplated in the agreement by reason of the wreck or loss of the ship, and whenever such service terminates before such period as aforesaid by reason of his being left on shore at any place abroad, under a certificate of his unfitness or inability to proceed on the voyage, granted as herein mentioned, such seaman shall be entitled to wages for the time of service prior to such termination as aforesaid, but not for any further period. 36 Vict. c. 129, s. 48.

49. No seaman or apprentice belonging to any ship registered in any of the said provinces shall be entitled to wages for any period during which he unlawfully refuses or neglects to work when required, whether before or after the time fixed by the agreement for his beginning work, or unless the Court hearing the case otherwise directs, for any period during which he is lawfully imprisoned for any offence committed by him. 36 Vict. c. 129, s. 49.

Wages not to accrue during refusal to work or imprisonment.

50. Whenever a seaman belonging to any ship registered in any of the said provinces is, by reason of illness, incapable of performing his duty, and it is proved that such illness has been caused by his own wilful act or default, he shall not be entitled to wages for the time during which he is, by reason of such illness, incapable of performing his duty. 36 Vict. c. 129, s. 50.

Nor during illness caused by wilful act or default.

51. The master or owner of every ship registered in any of the said provinces shall pay every seaman belonging to such ship, his wages, if demanded within three days after the delivery of the cargo, or five days after the seaman's discharge, whichever first happens; but this provision shall not apply to cases in which the seaman by the agreement is paid by a share of the profits of the adventure. 36 Vict. c. 129, s. 51.

Period within which wages are to be paid.

MODE OF RECOVERING WAGES.

52. Any seaman or apprentice belonging to any ship registered in any of the said provinces, or any person duly authorized on his behalf, may sue in a summary manner before any judge of the Superior Court for Lower Canada, any judge of the Sessions of the Peace, any judge of a County Court, stipendiary magistrate, police magistrate, or any two justices of the peace acting in or near the place at which the service has terminated, or at which the seaman or apprentice has been discharged, or at which any master or owner or other person upon whom the claim is made is or resides, for any amount of wages due to such seaman or apprentice, not exceeding two hundred dollars, over and above the costs of any proceeding for the recovery thereof, as soon as the same becomes payable; and such judge, magistrate

Seamen may sue for wages in a summary manner.

Master or owner may be summoned to appear.

or justices may, upon complaint on oath made to him or them by such seaman or apprentice, or on his behalf, summon such master or owner or other person to appear before him or them to answer such complaint. 36 Vict. c. 129, s. 52.

Judges may make order for payment of wages.

53. Upon appearance of such master or owner, or in default thereof, on due proof of his having been so summoned, such judge, magistrate or justices may examine upon the oath of the respective witnesses of the parties (if there are any), or upon the oath of either of the parties, in case one of the parties requires such oath from the other, before such judge, magistrate or justices, touching the complaint, and amount of wages due, and may make such order for the payment thereof as to such judge, magistrate or justices appears reasonable and just; and any order made by such judge, magistrate or justices shall be final. 36 Vict. c. 129, s. 53.

Warrant of distress may be issued.

54. If such order is not obeyed within twenty-four hours next after the making thereof, such judge, magistrate or justices may issue a warrant to levy the amount of the wages awarded to be due, by the distress and sale of the goods and chattels of the person on whom such order is made, paying to such person the overplus of the proceeds of the sale, after deducting therefrom all the charges and expenses incurred by the seaman or apprentice in the making and hearing of the complaint, as well as those incurred by the distress and levy, and in the enforcement of the order. 36 Vict. c. 129, s. 54.

If sufficient distress cannot be found wages and expenses may be levied on ship, or person may be committed.

55. If sufficient distress cannot be found, such judge, magistrate or justices may cause the amount of such wages and expenses to be levied on the ship in respect of the service on board which the wages are claimed, or the tackle and apparel thereof; and if such ship is not within the jurisdiction of such judge, magistrate or justices, then they may cause the person on whom the order for payment is made to be apprehended and committed to the common gaol of the locality, or if there is no gaol there, then to that which is nearest to the locality, for a term not exceeding three months

and not less than one month, under each such condemnation. 36 Vict. c. 129, s. 55.

56. No suit or proceedings for the recovery of wages under the sum of two hundred dollars shall be instituted by or on behalf of any seaman or apprentice belonging to any ship registered in any of the said provinces in any Court of Vice-Admiralty, or in any Superior Court in any of the said provinces, unless the owner of the ship is insolvent within the meaning of any Act respecting insolvency, for the time being in force in Canada,—or unless the ship is under arrest or is sold by the authority of any such Court of Vice-Admiralty or Superior Court as aforesaid,—or unless any judge, magistrate or justice, acting under the authority of this Act, refers the case to be adjudged by such Court,—or unless neither the owner nor the master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore. 36 Vict. c. 129, s. 56.

Restrictions on suits for wages in Superior Courts.

57. If any suit for the recovery of a seaman's wages is instituted against any such ship, or the master or owner thereof, in any Court of Vice-Admiralty or in any Superior Court in any of the said provinces, and it appears to the Court, in the course of such suit, that the plaintiff might have had as effectual a remedy for the recovery of his wages by complaint to a judge, magistrate or two justices of the peace under this Act, then the judge shall certify to that effect, and thereupon no costs shall be awarded to the plaintiff. 36 Vict. c. 129, s. 57.

If suits are brought unnecessarily before Superior Court, no costs to plaintiff.

58. No seaman belonging to any Canadian foreign sea-going ship, who is engaged for a voyage or engagement which is to terminate in any of the said provinces, shall be entitled to sue in any Court abroad for wages, unless he is discharged with such sanction as herein required, and with the written consent of the master, or proves such ill-usage on the part of the master or by his authority, as to warrant reasonable apprehension of danger to the life of such seaman if he remained on board; but if any seaman on his return to any of the said provinces proves that the master or owner has been guilty of any conduct or default

No seaman to sue for wages abroad, except in cases of discharge or danger of life.

Provided.

which, but for this section, would have entitled the seaman to sue for wages before the termination of the voyage or engagement, he shall be entitled to recover in addition to his wages such compensation, not exceeding eighty dollars, as the Court hearing the case thinks reasonable. 36 Vict. c. 129, s. 58.

Master to have same remedies for wages as seaman.

59. Every master of a ship registered in any of the said provinces shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages, which by this Act or by any law or custom any seaman, not being a master, has for the recovery of his wages; and if, in any proceeding in any Court of Vice-Admiralty, or Court possessing Admiralty jurisdiction in any of the said provinces touching the claim of a master to wages, any right of set-off or counter claim is set up, such Court may enter into and adjudicate upon all questions and settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and may direct payment of any balance which is found to be due. 36 Vict. c. 129, s. 59.

In consequence of the decision of the House of Lords in the case of *The Sara* (14 App. Cas. 209), the following amendment was made to the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 191:

“Every master of a ship and every person lawfully acting as master of a ship by reason of the decease or incapacity from illness of the master of the ship, shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, as master of the ship now has for the recovery of his wages; and if, in any proceeding in any Court of Admiralty or Vice-Admiralty, or in any County Court having Admiralty jurisdiction touching the claim of a master, or any person lawfully acting as master to wages or such disbursements or liabilities as aforesaid, any right of set-off or counter claim is set up, it shall be lawful for the Court to enter into and adjudicate upon all questions, and to settle all accounts then arising or outstanding and unsettled

between the parties to the proceedings and to direct payment of any balance which is found to be due." 52 & 53 Vict. c. 46, s. 1 (Imp.), A. D. 1889.

It was decided in *The Aurora*, 3 E. C. R., 228, January 1893, that the master, under the Inland Waters Seaman's Act (R. S. C. c. 75), had no lien upon the vessel for his wages earned by him as such master. A lien was, however, given by the Statute 56 Vict. c. 24 (Can.), passed April 1, 1893. This latter statute is substantially a copy of 52 & 53 Vict. c. 46, s. 1 (Imp.), *supra*.

R. S. CAN. CAP. 79.

An Act respecting the Navigation of Canadian Waters.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

INTERPRETATION.

- Interpretation.** 1. In this Act, unless the context otherwise requires,—
- "Vessel."** (a) The expression "vessel" includes every description of vessel used in navigation;
- "Ship."** (b) The expression "ship" includes every description of vessel not propelled by oars;
- "Steamboat" or "steamship."** (c) The expression "steamship" or "steamboat" includes every vessel propelled wholly or in part by steam or by any machinery or power other than sails or oars;
- "Practice of seamen."** (d) The expression "ordinary practice of seamen," as applied to any case, means and includes the ordinary practice of skilful and careful persons engaged in navigating the waters of Canada in like cases;
- "Owner."** (e) The expression "owner" includes the lessee or charterer of any vessel having the control of the navigation thereof. 43 Vict. c. 29, s. 3.

REGULATIONS FOR PREVENTING COLLISIONS.

- Extent of application of the following rules.** 2. The following rules with respect to lights, fog signals, steering and sailing and rafts, shall apply to all the rivers, lakes and other navigable waters within Canada, or within the jurisdiction of the Parliament thereof: that is to say:

Preliminary.

- Steamships under sail or under steam.** Art. 1. In the following rules every steamship which is under sail and not under steam is to be considered a sailing ship; and every steamship which is under steam, whether under sail or not, is to be considered a ship under steam.

Rules concerning Lights.

- What lights shall be carried.** Art. 2. The lights mentioned in the following Articles, numbered 3, 4, 5, 6, 7, 8, 9, 10 and 11, and no others, shall be carried in all weathers, from sunset to sunrise.

Art. 3. A steamship when under way shall carry—

By steamships
under way.

(a) On or in front of the foremast, at a height above the hull of not less than twenty feet, and if the breadth of the ship exceeds twenty feet, then at a height above the hull not less than such breadth, a bright white light, so constructed as to show an uniform and unbroken light over an arc of the horizon of twenty points of the compass,—so fixed as to throw the light ten points on each side of the ship, viz., from right ahead to two points abaft the beam on either side,—and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles;

At foremast
head.

(b) On the starboard side, a green light so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass—so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side—and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles;

On starboard
side.

(c) On the port side, a red light, so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass—so fixed as to throw the light from right ahead to two points abaft the beam on the port side—and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles;

On port side.

(d) The said green and red side lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow;

How to be
fitted.

(e) To ensure that red and green side lights shall show an uniform light from right ahead of the ship to two points abaft the beam on the port and starboard sides respectively, and shall not show across the bow of the ship itself, the said light must be fixed and the screens fitted so that the rays from the red and the green lights shall cross the line of the ship's keel projected ahead of the ship at a reasonable distance ahead of the ship.

With regard to all vessels whose lights are inspected, the red and green side lights will not be deemed to be fixed and fitted in accordance with the regulations, unless it is so fixed and screened that a line drawn from the outside edge of the wick to the foremost end of the inboard screen of such light shall make an angle of four degrees, or as near thereto as may be practicable, with a line drawn parallel with the keel of the ship from the outside edge of the wick (1).

By steamships
towing.

Art. 4. A steamship, when towing another ship, a raft or rafts, shall, in addition to her side lights, carry two bright white lights in a vertical line, one over the other, not less than three feet apart, so as to distinguish her from other steamships: each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light which other steamships are required to carry.

Lights and
shapes by steam
or sailing ships
when not under
command.

Art. 5. A ship, whether a steamship or a sailing ship, when employed either in laying or in picking up a telegraph cable, or which from any accident is not under command, shall at night carry, in the same position as the white light which steamships are required to carry, and, if a steamship, in place of that light, three red lights in globular lanterns, each not less than ten inches in diameter, in a vertical line one over the other, not less than three feet apart; and shall by day carry in a vertical line one over the other, not less than three feet apart, in front of but not lower than her foremast head, three black balls or shapes, each two feet in diameter;

What to denote,

(a) These shapes and lights are to be taken by approaching ships as signals that the ship using them is not under command, and cannot therefore get out of the way;

When to carry
side lights.

(b) The above ships when not making any way through

(1) Sub-section (e) of Article 3 was adopted in Canada in 1893 so as to bring the regulations for preventing collisions on navigable waters within Canada into conformity with the amendment adopted in England by Order in Council of date January 30, 1893. This sub-section is, with one or two verbal exceptions, a copy of the English amendment. The Imperial regulations of 1884 may be found in 9 P. D., p. 248.

the water, shall not carry the side lights, but when making way shall carry them.

Art. 6. A sailing ship under way, or being towed, shall carry the same lights as are provided by Article 3 for a steamship under way, with the exception of the white light,—which she shall never carry. By sailing ships in motion.

Art. 7. Whenever, as in the case of small vessels during bad weather, the green and red side lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for use; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side nor the red light on the star-board side: By small vessels in bad weather.

To make the use of these portable lights more certain and easy, the lanterns containing them shall each be painted outside with the color of the light they respectively contain, and shall be provided with proper screens. Lanterns to be painted outside.

Art. 8. A ship, whether a steamship or a sailing ship, when at anchor, shall carry, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of not less than eight inches in diameter, and so constructed as to show a clear, uniform and unbroken light visible all around the horizon, and at a distance of at least one mile. By ships at anchor.

Art. 9. A pilot vessel, when engaged on her station on pilotage duty, shall not carry the lights required for other vessels, but shall carry a white light at the masthead, visible all around the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes: By pilot vessels on duty.

(a) A pilot vessel, when not engaged on her station on pilotage duty, shall carry lights similar to those of other ships. When not on duty.

Art. 10. (a) Open fishing boats and other open boats when under way shall not be obliged to carry the side lights Open fishing and other boats.

required for other vessels; but every such boat shall, in lieu thereof, have ready at hand a lantern with a green glass on the one side and a red glass on the other side; and on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side;

When at anchor.

(b) A fishing vessel, and an open boat, when at anchor, shall exhibit a bright white light;

Fishing vessels when drift net fishing.

(c) A fishing vessel, when employed in drift net fishing, shall carry on one of her masts two red lights in a vertical line one over the other, not less than three feet apart;

Trawlers at work.

(d) A trawler at work shall carry on one of her masts two lights in a vertical line one over the other, not less than three feet apart, the upper light red, and the lower green, and shall also either carry the side lights required for other vessels, or, if the side lights cannot be carried, have ready at hand the colored lights as provided in Article 7, or a lantern with a red and a green glass as described in paragraph (a) of this Article;

Flare-up lights.

(e) Fishing vessels and open boats shall not be prevented from using a flare-up light in addition, if they desire so to do;

The said lights substituted for those under convention with France.

(f) The lights mentioned in this Article are substituted for those mentioned in the 12th, 13th and 14th Articles of the Convention between France and England scheduled to the "British Sea Fisheries Act, 1868";

Lanterns for lights.

(g) All lights required by this Article, except side lights, shall be in globular lanterns, so constructed as to show all round the horizon.

Ship overtaken by another.

Art. 11. A ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light.

Sound Signals for Fog, etc.

Steamships to have certain sound signals.

Art. 12. A steamship shall be provided with a steam whistle or other efficient steam sound signal, so placed that the sound may not be intercepted by any obstruction, and also with an efficient bell. A sailing ship shall be provided

with an efficient fog horn, to be sounded by a bellows or other mechanical means, and also with an efficient bell :

In fog, mist, or falling snow, whether by day or night, ^{In fogs, etc.} the signals described in this Article shall be used as follows ; that is to say :

(a) A steamship under way shall make with her steam ^{Blasts at intervals by steamships.} whistle or other steam sound signal, at intervals of not more than two minutes, a prolonged blast ;

(b) A sailing ship under way shall make with her fog ^{Signals by fog horn by sailing ships.} horn, at intervals of not more than two minutes, when on the starboard tack one blast, when on the port tack two blasts in succession, and when with the wind abaft the beam, three blasts in succession ;

(c) A steamship and a sailing ship, when not under way, ^{By ringing bell.} shall, at intervals of not more than two minutes, ring the bell.

Speed of Ships to be Moderate in Fog, etc.

Art. 13. Every ship, whether a sailing ship or steamship, ^{Speed restricted in fog, etc.} shall, in a fog, mist, or falling snow, go at a moderate speed.

Steering and Sailing Rules.

Art. 14. When two sailing ships are approaching one another, so as to involve risk of collision, one of them shall ^{Sailing ships meeting.} keep out of the way of the other, as follows, that is to say :

(a) A ship which is running free shall keep out of the way of a ship which is close-hauled ;

(b) A ship which is close-hauled on the port tack shall keep out of the way of a ship which is close-hauled on the starboard tack ;

(c) When both are running free with the wind on different sides, the ship which has the wind on the port side shall keep out of the way of the other ;

(d) When both are running free with the wind on the same side, the ship which is to windward shall keep out of the way of the ship which is to leeward ;

(e) A ship which has the wind aft shall keep out of the way of the other ship.

Art. 15. If two ships under steam are meeting end on, or ^{Steamships meeting.} nearly end on, so as to involve risk of collision, each shall

alter her course to starboard, so that each may pass on the port side of the other :

Limitation of
this article.

(a) This Article only applies to cases where ships are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two ships which must, if both keep on their respective courses, pass clear of each other ;

Cases to which
it applies.

(b) The only cases to which it does apply are, when each of the two ships is end on, or nearly end on, to the other ; in other words, to cases in which, by day, each ship sees the masts of the other in a line, or nearly in a line, with her own ; and by night, to cases in which each ship is in such a position as to see both the side lights of the other ;

Cases to which
it does not
apply.

(c) It does not apply by day to cases in which a ship sees another ahead crossing her own course, or by night, to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

Steamships
crossing.

Art. 16. If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

Steamships and
sailing ships.

Art. 17. If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.

Steamships
nearing a
vessel.

Art. 18. Every steamship, when approaching another ship, so as involve risk of collision, shall slacken her speed or stop and reverse if necessary.

How steamships
may signal by
steam.

Art. 19. In taking any course authorized or required by these regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, that is to say :

One short blast to mean "I am directing my course to starboard."

Two short blasts to mean "I am directing my course to port."

Three short blasts to mean "I am going full speed astern."

The use of these signals is optional; but if they are used, ^{Signalling to be optional.} the course of the ship must be in accordance with the signal made.

Art. 20. Notwithstanding anything contained in any pre- ^{Ship overtaking another.} ceding Article, every ship, whether a sailing ship or a steamship, overtaking any other, shall keep out of the way of the overtaken ship.

Art. 21. In narrow channels every steamship shall, when ^{Steamships in narrow channels.} it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such ship.

Art. 22. When by the above rules one of two ships is to ^{Ship keeping out of the way.} keep out of the way, the other shall keep her course.

Art. 23. In obeying and construing these rules, due regard ^{Regard to be had to dangers of navigation.} shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

No Ship, under any Circumstances, to Neglect Proper Precautions.

Art. 24. Nothing in these rules shall exonerate any ship, ^{Rules not to excuse.} or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution required by the ordinary practice of seamen, or by the special circumstances of the case.

Reservation of Rules for Harbors and Inland Navigation.

Art. 25. Nothing in these rules shall interfere with the ^{Rules by local authorities.} operation of a special rule, duly made by local authority, relative to the navigation of any harbor, river, or inland navigation.

Special Lights for Squadrons and Convoys.

Art. 26. Nothing in these rules shall interfere with the ^{Squadrons or convoys.} operation of any special rules made by the government of any nation with respect to additional station and signal

lights for two or more ships of war or for ships sailing under convoy.

Rafts and Harbor of Sorel.

Rules for rafts. Art. 27. Rafts, while drifting or at anchor on any of the waters of Canada, shall have a bright fire kept burning on them from sunset to sunrise. Whenever any raft is going in the same direction as another which is ahead, the one shall be so navigated as not to come within twenty yards of the other, and every vessel meeting or overtaking a raft shall keep out of the way thereof. Rafts shall be so navigated and anchored as not to cause any unnecessary impediment or obstruction to vessels navigating the same waters.

Not to obstruct vessels.

Harbor of Sorel. Art. 28. Unless it is otherwise directed by the Harbor Commissioners of Montreal, ships or vessels entering or leaving the harbor of Sorel shall take the port side, any thing in the preceding articles to the contrary notwithstanding.

As to Articles 27 and 28.

Art. 29. The rules of navigation contained in Articles 27 and 28, shall be subject to the provisions contained in Articles 23 and 24. 43 Vict. c. 29, s. 2; 44 Vict. c. 21, s. 2; 49 Vict. c. 4, s. 2 *and* schedule.

LOCAL BY-LAWS, PENALTIES, ETC.

Provision as to local by-laws and rules.

3. No rule or by-law of the Harbor Commissioners of Montreal or the Trinity House of Quebec, or Quebec Harbor Commissioners, or other local rule or by-law inconsistent with this Act, shall be of any force or effect; but so far as it is not inconsistent with this Act, any such rule or by-law made by the said Harbor Commissioners of Montreal or Trinity House of Quebec, or Quebec Harbor Commissioners, or other competent local authority, shall be of full force and effect within the locality to which it applies. 43 Vict. c. 29, s. 4.

Penalty for wilful disobedience of this Act.

4. All owners, masters and persons in charge of any ship, vessel, or raft, shall obey the rules prescribed by this Act, and shall not carry and exhibit any other lights or use any other fog signals than such as are required by the said rules; and in case of wilful default, such master or person in

charge, or such owner, if it appears that he was in fault, shall for each occasion on which any of the said rules is violated, incur a penalty not exceeding two hundred dollars and not less than twenty dollars. 43 Vict. c. 29, s. 5.

5. If, in any case of collision, it appears to the Court before which the case is tried, that such collision was occasioned by the non-observance of any of the rules prescribed by this Act, the vessel or raft by which such rules have been violated shall be deemed to be in fault; unless it can be shown to the satisfaction of the Court that the circumstances of the case rendered a departure from the said rules necessary. 43 Vict. c. 29, s. 6.

Collision from non-observance of rules.

6. If any damage to person or property arises from the non-observance by any vessel or raft of any of the rules prescribed by this Act, such damage shall be deemed to have been occasioned by the wilful default of the person in charge of such raft, or of the deck of such vessel at the time, unless the contrary is proved, or it is shown to the satisfaction of the Court that the circumstances of the case rendered a departure from the said rules necessary; and the owner of the vessel or raft, in all civil proceedings, and the master or person in charge as aforesaid, or the owner—if it appears that he was in fault—in all proceedings, civil or criminal, shall be subject to the legal consequences of such default. 43 Vict. c. 29, s. 7.

Liability for damage occasioned by non-observance of rules.

7. In any cause or proceeding for damages arising out of a collision between two vessels, or a vessel and a raft, both vessels or both the vessel and the raft are found to have been in fault, the rules heretofore in force in the Court of Admiralty in England, and now in Her Majesty's High Court of Justice, under the "Supreme Court of Judicature Act, 1873," so far as they are at variance with the rules in force in the courts of common law, shall prevail, and the damages shall be borne equally by the two vessels, or the vessel and the raft, one half by each. 43 Vict. c. 29, s. 8.

Case where both vessels are in fault.

Imp. Act, 36-37 Vict. c. 66.

8. Unless herein otherwise provided, all penalties incurred under this Act may be recovered in the name of Her Majesty, by any inspector of steamboats, or by any person

Recovery of penalties.

aggrieved by any act, neglect or wilful omission by which the penalty is incurred, before any two justices of the peace, on the evidence of one credible witness; and in default of payment of such penalty, such justices may commit the offender to gaol for any term not exceeding three months; and, except as hereinafter provided, all penalties recovered under this Act shall be paid over to the Minister of Finance and Receiver General, and shall be by him placed at the credit of and shall form part of the Steamboat Inspection Fund: Provided always, that all penalties incurred for any offence against this Act shall, if such offence is committed within the jurisdiction of the Quebec Harbor Commissioners, or of the Harbor Commissioners of Montreal, be sued for, recovered, enforced and applied in like manner as penalties imposed for the violation of the by-laws of the said Harbor Commissioners within whose jurisdiction the offence is committed. 43 Vict. c. 29, s. 9.

Foreign ships
in Canadian
waters.

9. Whenever foreign ships are within Canadian waters, the rules for preventing collisions prescribed by this Act, and all provisions of this Act relating to such rules, or otherwise relating to collisions, shall apply to such foreign ships; and in any case arising in any court of justice in Canada concerning matters happening within Canadian waters, foreign ships shall, so far as regards such rules and provisions, be treated as if they were British or Canadian ships. 43 Vict. c. 29, s. 11.

DUTY OF MASTERS; LIABILITY OF OWNERS OF SHIPS.

Duties of
masters of
vessels in case
of collision.

10. In every case of collision between two ships, the person in charge of each ship shall, if and so far as he can do so without danger to his own ship and crew, render to the other ship, her master, crew and passengers, such assistance as is practicable, and as is necessary in order to save them from any danger caused by such collision; and shall also give to the master or other person in charge of the other ship the name of his own ship and of her port of registry, or of the port or place to which she belongs, and also the names of the ports and places from which and to which she is bound; and if he fails so to do, and no reasonable excuse

Penalty for
default.

for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect or default. 43 Vict. c. 29, s. 12, *part*.

11. Every master or person in charge of a British or Canadian ship, who fails, without reasonable cause, to render such assistance, or to give such information as aforesaid, is guilty of a misdemeanor; and if he is a certificated officer under Canadian authority, an inquiry into his conduct may be held, and his certificate may be cancelled or suspended. 43 Vict. c. 29, s. 12, *part*.

Further penalty
in case of British
or Canadian
ships.

12. The owners of any ship, whether British, Canadian or foreign, shall not, whenever all or any of the following events occur without their actual fault or privity, that is to say:

Liability of
owners limited
in case of col-
lision without
their fault.

(a) When any loss of life or personal injury is caused to any person being carried in such ship;

(b) When any damage or loss is caused to any goods, merchandise or other things whatsoever on board any such ship;

(c) When any loss of life or personal injury is, by reason of the improper navigation of such ship as aforesaid, caused to any person in any other ship or boat;

(d) When any loss or damage is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise or other things whatsoever on board any other ship or boat,—

Be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise or other things, nor in respect of loss or damage to ships, goods, merchandise or other things, whether there is in addition loss of life or personal injury or not, to aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage,—such tonnage to be the registered tonnage in the case of sailing ships; and in the case of steamships the gross tonnage without deduction on account of engine room.

Extreme
amount recover-
able.

Tonnage.

(2) In the case of any British or Canadian ship, such tonnage shall be the registered or gross tonnage, according to the British or Canadian law, and in the case of a foreign ship

How calcu-
lated.

which has been or can be measured according to British or Canadian law, the tonnage, as ascertained by such measurement, shall, for the purposes of this section, be deemed to be the tonnage of such ship.

Tonnage, how
calculated in
certain cases.

(3) In the case of any foreign ship which has not been and cannot be measured according to British or Canadian law, the deputy of the minister of marine shall, on receiving from or by direction of the Court hearing the case, such evidence concerning the dimensions of the ship as it is found practicable to furnish, give a certificate under his hand, stating what would, in his opinion, have been the tonnage of such ship if she had been duly measured according to Canadian law, and the tonnage so stated in such certificate shall, for the purposes of this section, be deemed to be the tonnage of such ship. 43 Vict. c. 29, s. 13.

As to insur-
ances in such
cases.

13. Insurances effected against any or all of the events enumerated in the section next preceding, and occurring without such actual fault or privity as therein mentioned, shall not be invalid by reason of the nature of the risk. 43 Vict. c. 29, s. 14.

Provision in
case of altera-
tion of Imperial
regulations.

14. If Her Majesty, acting on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council, annuls or modifies any of the regulations for preventing collisions on navigable waters, which, by Order of Her Majesty in Council of the fourteenth day of August, 1879, were substituted for those theretofore in force for like purposes in the United Kingdom, or makes new regulations in addition thereto or in substitution therefor, the Governor in Council may, from time to time, make corresponding changes, as respects Canadian waters, in the regulations contained in the second section of this Act, or any that may be substituted for them, or may suspend them or any of them, and make others in their stead, or may revive all or any of the regulations in the Act of the Parliament of Canada passed in the thirty-first year of Her Majesty's reign, and intituled, "An Act respecting the navigation of Canadian waters," as he deems best for insuring the correspondence of the regulations of Her Majesty in Council with those of the Governor in Council. 44 Vict. c. 20, s. 2.

DECISIONS WHICH REFER TO THE ABOVE ARTICLES.

- Art. 2. *The Anglo-Indian*, 33 L. T. N. S. 233; 23 W. R. 882.
- Art. 3. *The Arklow*, 9 App. Cas. 136.
The Fannie M. Carvell, 13 App. Cas. 455 n.
The Glamorganshire, 13 App. Cas. 454.
- Art. 5. *The Esk* and *The Gitana*, L. R. 2 Ad. 350; 38 L. J. Ad. 33; *The P. Carland* (1893), A. C. 207.
- Art. 6. *The Duke of Buccleuch* (1891), A. C. 310.
- Art. 7. *The C. M. Palmer*, 29 L. T. N. S. 120.
- Art. 9. *The Edith*, Ir. Rep. 10 Eq. 345.
- Art. 12. *The Spring*, L. R. 1 Ad. 99; 14 W. R. 975.
The Peckforton Castle, 2 P. D. 222; 3 P. D. 11.
- Art. 13. *The Jesmond* and *The Earl of Elgin*, L. R. 4 P. C. 1; 8 Moore P. C. N. S. 179.
The Concordia, L. R. 1 Ad. 93; 14 L. T. N. S. 896.
- Art. 14. *The Ranger* and *The Cologne*, L. R. 4 P. C. 519; 27 L. T. N. S. 769.
The Concordia, sup. *The Nor*, 30 L. T. N. S. 576.
The Ada, 28 L. T. N. S. 825.
The Velocity, L. R. 3 P. C. 44; 39 L. J. Ad. 20.
The Franconia, 2 P. D. 8.
- Art. 15. *The Jennie S. Barker*, L. R. 4 Ad. 456; 44 L. J. Ad. 20; *The Otto* and *The Thorsa* (1894) A. C. 116.
The American and *The Syria*, L. R. 4 Ad. 226; L. R. 6 P. C. 127.
The Warrior, L. R. 3 Ad. 553; 27 L. T. N. S. 101.
The Norma, 35 L. T. N. S. 418.
- Art. 16. *The Jesmond* and *The Earl of Elgin*, L. R. 4 P. C. 1; 8 Moore P. C. N. S. 179.
The Norma, sup.; *The Moliere* (1893), P. 217.
The Frankland, L. R. 4 P. C. 529; 27 L. T. N. S. 633.
- Art. 17. *The Earl Spencer*, L. R. 4 Ad. 431; 33 L. T. N. S. 23.
- Art. 18. *The Warrior*, L. R. 3 Ad. 553; 27 L. T. N. S. 101.
The Norma, 35 L. T. N. S. 418.
The Lancashire (1893), P. 47; s. c. (1894) A. C. 1.

- Art. 19. *The Aino* and *The Amelia*, 29 L. T. N. S. 118; 21 W. R. 707.
The American and *The Syria*, L. R. 4 Ad. 226.
The Warrior, sup.
The Adu, 28 L. T. N. S. 825.
- Art. 20. *The John Fenwick*, L. R. 3 Ad. 500; 41 L. J. Ad. 500.
The American and *The Syria*, sup.
The Thomas Lea, 35 L. T. N. S. 406.
The Philotaxe, 37 L. T. N. S. 540.
- Art. 22. *The Tasmania*, 15 App. Cas. 223.

NOTE.—The above list has been compiled chiefly from Roscoe Ad. Prac. (ed. 1878) Appendix, p. 168.

53 & 54 VICT. CAP. 27.

An Act to amend the law respecting the exercise of Admiralty Jurisdiction in Her Majesty's Dominions and elsewhere out of the United Kingdom.

25TH JULY, 1890.

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows :

1. This Act may be cited as the Colonial Courts of Ad-^{Short title.}miralty Act, 1890.

2.—(1) Every Court of Law in a British possession, which ^{Colonial Courts of Admiralty.} is for the time being declared in pursuance of this Act to be a Court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in this Act mentioned, and may, for the purpose of that jurisdiction, exercise all the powers which it possesses for the purpose of its other civil jurisdiction; and such Court, in reference to the jurisdiction conferred by this Act, is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession the governor is the sole judicial authority, the expression "Court of Law" for the purposes of this section includes such governor.

(2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.

(3) Subject to the provisions of this Act any enactment referring to a Vice-Admiralty Court, which is contained in

an Act of the Imperial parliament or in a colonial law, shall apply to a Colonial Court of Admiralty, and be read as if the expression "Colonial Court of Admiralty" were therein substituted for "Vice-Admiralty Court" or for other expressions respectively referring to such Vice-Admiralty Courts or the judge thereof; and the Colonial Court of Admiralty shall have jurisdiction accordingly.

Provided as follows:

(a) Any enactment in any Act of the Imperial parliament referring to the Admiralty jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for England and Wales; and—

27 & 28 Vict.
c. 25.
36 & 37 Vict.
c. 58.

(b) A Colonial Court of Admiralty shall have, under the Naval Prize Act, 1864, and under the Slave Trade Act, 1873, and any enactment relating to prize or the slave trade, the jurisdiction thereby conferred on a Vice-Admiralty Court and not the jurisdiction thereby conferred exclusively on the High Court of Admiralty or the High Court of Justice; but, unless for the time being duly authorized, shall not, by virtue of this Act, exercise any jurisdiction under the Naval Prize Act, 1864, or otherwise in relation to prize; and—

(c) A Colonial Court of Admiralty shall not have jurisdiction under this Act to try or punish a person for an offence which, according to the law of England, is punishable on indictment; and—

(d) A Colonial Court of Admiralty shall not have any greater jurisdiction in relation to the laws and regulations relating to Her Majesty's navy at sea, or under any Act providing for the discipline of Her Majesty's navy, than may be, from time to time, conferred on such Court by Order in Council.

(4) Where a Court in a British possession exercises in respect of matters arising outside the body of a county or other like part of a British possession any jurisdiction exercisable under this Act, that jurisdiction shall be deemed to be exercised under this Act and not otherwise.

3. The legislature of a British possession may, by any colonial law—

Power of
Colonial legis-
lature as to
Admiralty
jurisdiction.

- (a) Declare any Court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Colonial Court of Admiralty, and provide for the exercise by such Court of its jurisdiction under this Act, and limit territorially or otherwise, the extent of such jurisdiction; and
- (b) Confer upon any inferior or subordinate Court in that possession such partial or limited Admiralty jurisdiction under such regulations and with such appeal (if any) as may seem fit:

Provided that any such colonial law shall not confer any jurisdiction which is not by this Act conferred upon a Colonial Court of Admiralty.

4. Every colonial law which is made in pursuance of this Act, or affects the jurisdiction of or practice or procedure in any Court of such possession in respect of the jurisdiction conferred by this Act, or alters any such colonial law as above in this section mentioned, which has been previously passed, shall, unless previously approved by Her Majesty through a secretary of state, either be reserved for the signification of Her Majesty's pleasure thereon, or contain a suspending clause providing that such law shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed.

Reservation of
Colonial law
for Her
Majesty's
assent.

5. Subject to rules of court under this Act, judgments of a Court in a British possession given or made in the exercise of the jurisdiction conferred on it by this Act, shall be subject to the like local appeal, if any, as judgments of the Court in the exercise of its ordinary civil jurisdiction, and the Court having cognizance of such appeal shall, for the purpose thereof, possess all the jurisdiction by this Act conferred upon a Colonial Court of Admiralty.

Local Admi-
ralty appeal.

6.—(1) The appeal from a judgment of any Court in a British possession in the exercise of the jurisdiction conferred by this Act, either where there is as of right no local

& Admiralty
appeal to the
Queen in
Council.

appeal or after a decision on local appeal, lies to Her Majesty the Queen in Council.

(2) Save as may be otherwise specially allowed in a particular case by Her Majesty the Queen in Council, an appeal under this section shall not be allowed—

(a) From any judgment not having the effect of a definitive judgment unless the Court appealed from has given leave for such appeal; nor

(b) From any judgment unless the petition of appeal has been lodged within the time prescribed by rules, or if no time is prescribed within six months from the date of the judgment appealed against, or if leave to appeal has been given then from the date of such leave.

(3) For the purpose of appeals under this Act, Her Majesty the Queen in Council and the Judicial Committee of the Privy Council shall, subject to rules under this section, have all such powers for making and enforcing judgments, whether interlocutory or final, for punishing contempts, for requiring the payment of money into Court, or for any other purpose, as may be necessary, or as were possessed by the High Court of Delegates before the passing of the Act transferring the powers of such Court to Her Majesty in Council, or as are for the time being possessed by the High Court in England, or by the Court appealed from in relation to the like matters as those forming the subject of appeals under this Act.

(4) All Orders of the Queen in Council or the Judicial Committee of the Privy Council for the purposes aforesaid, or otherwise, in relation to appeals under this Act, shall have full effect throughout Her Majesty's dominions, and in all places where Her Majesty has jurisdiction.

(5) This section shall be in addition to, and not in derogation of, the authority of Her Majesty in Council or the Judicial Committee of the Privy Council arising otherwise than under this Act, and all enactments relating to appeals to Her Majesty in Council, or to the powers of Her Majesty in Council, or the Judicial Committee of the Privy Council, in relation to those appeals, whether for making rules and orders or otherwise, shall extend, save as otherwise directed

by Her Majesty in Council, to appeals to Her Majesty in Council under this Act.

7.—(1) Rules of Court for regulating the procedure and Rules of Court. practice (including fees and costs) in a Court in a British possession in the exercise of the jurisdiction conferred by this Act, whether original or appellate, may be made by the same authority and in the same manner as rules touching the practice, procedure, fees and costs in the said Court in the exercise of its ordinary civil jurisdiction respectively are made: Provided that the rules under this section shall not, save as provided by this Act, extend to matters relating to the slave trade, and shall not, save as provided by this section, come into operation until they have been approved by Her Majesty in Council, but on coming into operation shall have full effect as if enacted in this Act; and any enactment inconsistent therewith shall, so far as it is so inconsistent, be repealed.

(2) It shall be lawful for Her Majesty in Council, in approving rules made under this section, to declare that the rules so made with respect to any matters which appear to Her Majesty to be matters of detail or of local concern, may be revoked, varied or added to, without the approval required by this section.

(3) Such rules may provide for the exercise of any jurisdiction conferred by this Act by the full court, or by any judge or judges thereof, and subject to any rules, where the ordinary civil jurisdiction of the Court can, in any case, be exercised by a single judge, any jurisdiction conferred by this Act may in the like case be exercised by a single judge.

8.—(1) Subject to the provisions of this section nothing in this Act shall alter the application of any droits of Admiralty or droits of or forfeitures to the Crown in a British possession; and such droits and forfeitures, when condemned by a Court of a British possession in the exercise of the jurisdiction conferred by this Act, shall, save as is otherwise provided by any other Act, be notified, accounted for and dealt with in such manner as the Treasury from time to time direct, and the officers of every Colonial Court Droits of Admiralty and of the Crown.

of Admiralty and of every other Court in a British possession exercising Admiralty jurisdiction shall obey such directions in respect of the said droits and forfeitures as may be from time to time given by the Treasury.

(2) It shall be lawful for Her Majesty the Queen in Council by Order to direct that, subject to any conditions, exceptions, reservations and regulations contained in the Order, the said droits and forfeitures condemned by a Court in a British possession shall form part of the revenues of that possession either for ever or for such limited term or subject to such revocation as may be specified in the Order.

(3) If and so long as any of such droits and forfeitures by virtue of this or any other Act form part of the revenues of the said possession the same shall, subject to the provisions of any law for the time being applicable thereto, be notified, accounted for and dealt with in manner directed by the government of the possession, and the Treasury shall not have any power in relation thereto.

Power to
establish Vice-
Admiralty
Courts.

9.—(1) It shall be lawful for Her Majesty, by commission under the Great Seal, to empower the Admiralty to establish in a British possession any Vice-Admiralty Court or Courts.

(2) Upon the establishment of a Vice-Admiralty Court in a British possession, the Admiralty, by writing under their hands and the seal of the office of Admiralty, in such form as the Admiralty may direct, may appoint a judge, registrar, marshal and other officers of the Court, and may cancel any such appointment; and in addition to any other jurisdiction of such Court, may (subject to the limits imposed by this Act or the said commission from Her Majesty) vest in such Court the whole or any part of the jurisdiction by or by virtue of this Act conferred upon any Courts of that British possession; and may vary or revoke such vesting, and while such vesting is in force the power of such last-mentioned Courts to exercise the jurisdiction so vested shall be suspended:

Provided that—

(a) Nothing in this section shall authorize a Vice-Admiralty Court so established in India or in any British

possession having a representative legislature, to exercise any jurisdiction except for some purpose relating to prize, to Her Majesty's navy, to the slave trade, to the matters dealt with by the Foreign Enlistment Act, 1870, or the Pacific Islanders Protection Acts, 1872 and 1875, or to matters in which questions arise relating to treaties or conventions with foreign countries, or to international law; and—

33 & 34 Vict.
c. 90.
35 & 36 Vict.
c. 19.
38 & 39 Vict.
c. 51.

(b) In the event of a vacancy in the office of judge, registrar, marshal or other officer of any Vice-Admiralty Court in a British possession, the governor of that possession may appoint a fit person to fill the vacancy until an appointment to the office is made by the Admiralty.

(3) The provisions of this Act with respect to appeals to Her Majesty in Council from Courts in British possessions in the exercise of the jurisdiction conferred by this Act, shall apply to appeals from Vice-Admiralty Courts, but the rules and orders made in relation to appeals from Vice-Admiralty Courts may differ from the rules made in relation to appeals from the said Courts in British possessions.

(4) If Her Majesty at any time by commission under the Great Seal so directs, the Admiralty shall, by writing under their hands and the seal of the office of Admiralty, abolish a Vice-Admiralty Court established in any British possession under this section, and upon such abolition the jurisdiction of any Colonial Court of Admiralty in that possession which was previously suspended shall be revived.

10. Nothing in this Act shall affect any power of appointing a vice-admiral in and for any British possession or any place therein, and whenever there is not a formally appointed vice-admiral in a British possession or any place therein, the governor of the possession shall be *ex-officio* vice-admiral thereof.

Power to appoint a vice-admiral.

11.—(1) The provisions of this Act with respect to Colonial Courts of Admiralty shall not apply to the Channel Islands.

Exception of Channel Islands and other possessions.

(2) It shall be lawful for the Queen in Council by Order to declare, with respect to any British possession which has

not a representative legislature, that the jurisdiction conferred by this Act on Colonial Courts of Admiralty shall not be vested in any Court of such possession, or shall be vested only to the partial or limited extent specified in the Order.

Application of
Act to Courts
under Foreign
Jurisdiction
Acts.

12. It shall be lawful for Her Majesty the Queen in Council by Order to direct that this Act shall, subject to the conditions, exceptions and qualifications (if any) contained in the order, apply to any Court established by Her Majesty for the exercise of jurisdiction in any place out of Her Majesty's dominions which is named in the Order as if that Court were a Colonial Court of Admiralty, and to provide for carrying into effect such application.

Rules for
procedure in
slave trade
matters.

36 & 37 Vict.
c. 59.
42 & 43 Vict.
c. 38.

13.—(1) It shall be lawful for Her Majesty the Queen in Council by Order to make rules as to the practice and procedure (including fees and costs) to be observed in and the returns to be made from Colonial Courts of Admiralty and Vice-Admiralty Courts in the exercise of their jurisdiction in matters relating to the slave trade, and in and from East African Courts as defined by the Slave Trade (East African Courts) Acts, 1873 and 1879.

(2) Except when inconsistent with such Order in Council, the rules of Court for the time being in force in a Colonial Court of Admiralty or Vice-Admiralty Court shall, so far as applicable, extend to proceedings in such Court in matters relating to the slave trade.

(3) The provisions of this Act with respect to appeals to Her Majesty in Council from Courts in British possessions, in the exercise of the jurisdiction conferred by this Act, shall apply, with the necessary modifications, to appeals from judgments of any East African Court made or purporting to be made in exercise of the jurisdiction under the Slave Trade (East African Courts) Acts, 1873 and 1879.

Orders in
Council.

14. It shall be lawful for Her Majesty in Council from time to time to make Orders for the purposes authorized by this Act, and to revoke and vary such Orders, and every such Order while in operation shall have effect as if it were part of this Act.

15. In the construction of this Act, unless the context ^{Interpretation.} otherwise requires,—

The expression “representative legislature” means, in relation to a British possession, a legislature comprising a legislative body of which at least one-half are elected by inhabitants of the British possession.

The expression “unlimited civil jurisdiction” means civil jurisdiction unlimited as to the value of the subject-matter at issue, or as to the amount that may be claimed or recovered.

The expression “judgment” includes a decree, order, and sentence.

The expression “appeal” means any appeal, rehearing, or review; and the expression “local appeal” means an appeal to any Court inferior to Her Majesty in Council.

The expression “colonial law” means any Act, ordinance, or other law having the force of legislative enactment in a British possession, and made by any authority other than the Imperial parliament of Her Majesty in Council, competent to make laws for such possession.

16.—(1) This Act shall, save as otherwise in this Act ^{Commence-} provided, come into force in every British possession on the ^{ment of Act.} first day of July, one thousand eight hundred and ninety-one.

Provided that—

(a) This Act shall not come into force in any of the British possessions named in the first schedule to this Act until Her Majesty so directs by Order in Council, and until the day named in that behalf in such Order; and—

(b) If before any day above mentioned Rules of Court for the Colonial Court of Admiralty in any British possession have been approved by Her Majesty in Council, this Act may be proclaimed in that possession by the governor thereof, and on such proclamation shall come into force on the day named in the proclamation.

(2) The day upon which this Act comes into force in any

British possession shall, as regards that British possession, be deemed to be the commencement of this Act.

26 & 27 Vict.
c. 24.

(3) If, on the commencement of this Act in any British possession, Rules of Court have not been approved by Her Majesty in pursuance of this Act, the rules in force at such commencement under the Vice-Admiralty Courts Act, 1863, and in India the rules in force at such commencement regulating the respective Vice-Admiralty Courts or Courts of Admiralty in India, including any rules made with reference to proceedings instituted on behalf of Her Majesty's ships, shall, so far as applicable, have effect in the Colonial Court or Courts of Admiralty of such possession, and in any Vice-Admiralty Court established under this Act in that possession, as Rules of Court under this Act, and may be revoked and varied accordingly; and all fees payable under such rules may be taken in such manner as the Colonial Court may direct, so however that the amount of each such fee shall, so nearly as practicable, be paid to the same officer or person who, but for the passing of this Act, would have been entitled to receive the same in respect of like business. So far as any such rules are inapplicable or do not extend, the Rules of Court for the exercise by a Court of its ordinary civil jurisdiction shall have effect as rules for the exercise by the same Court of the jurisdiction conferred by this Act.

(4) At any time after the passing of this Act any colonial law may be passed, and any Vice-Admiralty Court may be established, and jurisdiction vested in such Court, but any such law, establishment, or vesting shall not come into effect until the commencement of this Act.

Abolition of
Vice-Admiralty
Courts.

17. On the commencement of this Act in any British possession, but subject to the provisions of this Act, every Vice-Admiralty Court in that possession shall be abolished; subject as follows:

- (1) All judgments of such Vice-Admiralty Court shall be executed and may be appealed from in like manner as if this Act had not passed, and all appeals from any Vice-Admiralty Court pending at the commencement

of this Act shall be heard and determined, and the judgment thereon executed as nearly as may be in like manner as if this Act had not passed :

- (2) All proceedings pending in the Vice-Admiralty Court in any British possession at the commencement of this Act shall, notwithstanding the repeal of any enactment by this Act, be continued in a Colonial Court of Admiralty of the possession in manner directed by rules of court, and so far as no such rule extends, in like manner, as nearly as may be, as if they had been originally begun in such court :
- (3) Where any person holding an office, whether that of judge, registrar or marshal, or any other office in any such Vice-Admiralty Court in a British possession, suffers any pecuniary loss in consequence of the abolition of such Court, the government of the British possession, on complaint of such person, shall provide that such person shall receive reasonable compensation (by way of an increase of salary or a capital sum, or otherwise) in respect of his loss, subject nevertheless to the performance, if required by the said government, of the like duties as before such abolition.
- (4) All books, papers, documents, office furniture and other things at the commencement of this Act belonging, or appertaining to any Vice-Admiralty Court, shall be delivered over to the proper officer of the Colonial Court of Admiralty or be otherwise dealt with in such manner as, subject to any directions from Her Majesty, the governor may direct.
- (5) Where, at the commencement of this Act in a British possession, any person holds a commission to act as advocate in any Vice-Admiralty Court abolished by this Act, either for Her Majesty or for the Admiralty, such commission shall be of the same avail in every Court of the same British possession exercising jurisdiction under this Act, as if such Court were the Court mentioned or referred to in such commission.

18. The Acts specified in the second schedule to this Act ^{Repeal} shall, to the extent mentioned in the third column of that

schedule, be repealed as respects any British possession as from the commencement of this Act in that possession, and as respects any Courts out of Her Majesty's dominions as from the date of any Order applying to this Act :

Provided that—

- (a) Any appeal against a judgment made before the commencement of this Act may be brought and any such appeal and any proceedings or appeals pending at the commencement of this Act may be carried on and completed and carried into effect as if such repeal had not been enacted ; and—
 - (b) All enactments and rules at the passing of this Act in force touching the practice, procedure, fees, costs and returns in matters relating to the slave trade in Vice-Admiralty Courts and in East African Courts shall have effect as rules made in pursuance of this Act, and shall apply to Colonial Courts of Admiralty, and may be altered and revoked accordingly.
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COLONIAL COURTS OF ADMIRALTY ACT, 1890.

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SCHEDULES.

FIRST SCHEDULE.

Section 16.

BRITISH POSSESSIONS IN WHICH OPERATION OF ACT IS DELAYED.

New South Wales.

Victoria.

St. Helena.

British Honduras.

SECOND SCHEDULE.

ENACTMENTS REPEALED.

Section 18.

| Session and Chapter. | Title of Act. | Extent of Repeal. |
|----------------------|--|--|
| 56 Geo. 3 c. 82... | An Act to render valid the judicial Acts of Surrogates of Vice-Admiralty Courts abroad, during vacancies in office of Judges of such courts. | The whole Act. |
| 2 & 3 Will. 4 c. 51 | An Act to regulate the practice and the fees in the Vice-Admiralty Courts abroad, and to obviate doubts as to their jurisdiction. | The whole Act. |
| 3 & 4 Will. 4 c. 41 | An Act for the better administration of justice in His Majesty's Privy Council. | Section two. |
| 6 & 7 Vict. c. 38.. | An Act to make further regulations for facilitating the hearing appeals and other matters by the Judicial Committee of the Privy Council. | In section two, the words "or from any Admiralty or Vice-Admiralty Court," and the words "or the Lords Commissioners of Appeals in |

VICE-ADMIRALTY REPORTS.

SECOND SCHEDULE—*Continued.*

ENACTMENTS REPEALED.

| Session and Chapter. | Title of Act. | Extent of Repeal. |
|----------------------|--|--|
| | | <p>"prize causes or their "surrogates."</p> <p>In section three, the words "and the High "Court of Admiralty "of England," and the words "and from "any Admiralty or "Vice-Admiralty "Court."</p> <p>In section five, from the first "the High Court "of Admiralty" to the end of the section.</p> <p>In section seven, the words "and from Ad- "miralty or Vice- "Admiralty Courts."</p> <p>Sections nine and ten, so far as relates to maritime causes.</p> <p>In section twelve, the words "or maritime."</p> <p>In section fifteen, the words "and Admi- "rality and Vice-Ad- "miralty."</p> |
| 7 & 8 Vict. c. 69.. | An Act for amending an Act passed in the fourth year of the reign of His late Majesty, intituled: "An Act for the better administration of justice in His Maj- | <p>In section twelve, the words "and from Ad- "miralty and Vice- "Admiralty Courts," and so much of the rest of the section as relates to maritime causes.</p> |

COLONIAL COURTS OF ADMIRALTY ACT, 1890.

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SECOND SCHEDULE—*Continued.*

ENACTMENTS REPEALED.

| Session and Chapter. | Title of Act. | Extent of Repeal. |
|----------------------|--|---|
| | "esty's Privy Coun- "cil," and to extend its jurisdiction and powers. | |
| 26 Vict. c. 24..... | The Vice-Admiralty Courts Act, 1863. | The whole Act. |
| 30 & 31 Vict. c. 45 | The Vice-Admiralty Courts Act Amend- ment Act, 1867. | The whole Act. |
| 36 & 37 Vict. c. 59 | The Slave Trade (East African Courts) Act, 1873. | Sections four and five. |
| 36 & 37 Vict. c. 88 | The Slave Trade Act, 1873. | Section twenty as far as relates to the taxation of any costs, charges and expenses which can be taxed in pur- suance of this Act. In section twenty-three, the words "under the Vice-Admiralty Courts Act, 1863." |
| 38 & 39 Vict. c. 51 | The Pacific Islanders Protection Act, 1875. | So much of section six as authorizes Her Ma- jesty to confer Ad- miralty jurisdiction on any Court. |

54 & 55 VICT. CAP. 29.

An Act to provide for the exercise of Admiralty Jurisdiction within Canada, in accordance with "The Colonial Courts of Admiralty Act, 1890."

ASSENTED TO 31ST JULY, 1891.

Preamble.

53-54 Vict.
(Imp.) c. 27.

30-31 Vict.
(Imp.) c. 63.

52-53 Vict.
(Imp.) c. 63.

Whereas, by the third section of the Act of the Parliament of the United Kingdom, passed in the session held in the fifty-third and fifty-fourth years of Her Majesty's reign, chapter twenty-seven, intituled "An Act to amend the Law respecting the exercise of Admiralty Jurisdiction in Her Majesty's Dominions and elsewhere out of the United Kingdom," it is amongst other things provided that the legislature of a British possession may, by any colonial law, declare any Court of unlimited civil jurisdiction, whether original or appellate, in that possession, to be a Colonial Court of Admiralty, and provide for the exercise by such Court of its jurisdiction under the said Act; and whereas the authority given is exercisable by the parliament of Canada by virtue of the powers vested in it by "The British North America Act, 1867," and "The Interpretation Act, 1889," of the United Kingdom; and whereas the expression "unlimited civil jurisdiction," as defined by the Act first herein referred to, which may be cited as "The Colonial Courts of Admiralty Act, 1890," means civil jurisdiction unlimited as to the value of the subject-matter at issue, or as to the amount that may be claimed or recovered; and whereas by the second section of the said "Colonial Courts of Admiralty Act, 1890," it is amongst other things enacted that every court of law in a British possession, which is, for the time being, declared in pursuance of the said Act to be a Court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in the said Act mentioned; and whereas the Exchequer Court of Canada is a court of law which, within

Canada, has original unlimited civil jurisdiction as defined by the said Act, and it is desirable, in pursuance of the said Act, to declare the said Court to be a Court of Admiralty: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. This Act may be cited as "The Admiralty Act, 1891." Short title.
 2. In this Act the expression "the Exchequer Court," or Interpretation. "the court," means the Exchequer Court of Canada.
 3. In pursuance of the powers given by "The Colonial Exchequer Court constituted a Court of Admiralty. Courts of Admiralty Act, 1890," aforesaid, or otherwise in any manner vested in the parliament of Canada, it is enacted and declared that the Exchequer Court of Canada is and shall be, within Canada, a Colonial Court of Admiralty, and as a Court of Admiralty shall, within Canada, have and exercise all the jurisdiction, powers and authority conferred by the said Act and by this Act.
 4. Such jurisdiction, powers and authority shall be exer- Jurisdiction. cisable and exercised by the Exchequer Court throughout Canada, and the waters thereof, whether tidal or non-tidal, or naturally navigable or artificially made so, and all persons shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any Vice-Admiralty Court, as elsewhere therein, have all rights and remedies in all matters (including cases of contract and tort and proceedings *in rem* and *in personam*), arising out of or connected with navigation, shipping, trade or commerce, which may be had or enforced in any Colonial Court of Admiralty under "The Colonial Courts of Admiralty Act, 1890."
 5. The Governor in Council may, from time to time, con- Admiralty districts and registries. stitute any part of Canada an Admiralty district for the purposes of this Act, and fix the limits thereof, and provide for the establishment of some place therein of a registry of the Exchequer Court on its Admiralty side.
- (2) The Governor in Council may also, from time to time, change the limits of an Admiralty district, create new districts, and assign to any district a name and place of registry.

**Local judges
in Admiralty.**

6. The Governor in Council may, from time to time, appoint any judge of a Superior or County Court, or any barrister of not less than seven years standing, to be a local judge in Admiralty of the Exchequer Court in and for any Admiralty district; and every such local judge of Admiralty shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons; and such judge shall be designated a local judge in Admiralty of the Exchequer court.

Oath of Office.

7. Every such local judge in Admiralty shall, previously to his entering on the duties of his office, take, before the judge of the Exchequer Court or a judge of any Superior Court, an oath in the form following, that is to say:

"I, _____ do solemnly and sincerely swear that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as local judge in Admiralty in and for the Admiralty district of (*as the case may be*). So help me God."

**Officers of
Court.**

8. The Governor in Council may, from time to time, appoint for any district a registrar, a marshal and such other officers and clerks as are necessary.

**Powers of
local judges.**

9. Every local judge in Admiralty shall, within the Admiralty district for which he is appointed, have and exercise the jurisdiction, and the powers and authority relating thereto, of the judge of the Exchequer Court in respect of the Admiralty jurisdiction of such Court.

Deputy judges.

10. A local judge in Admiralty may, from time to time, with the approval of the Governor in Council, appoint a deputy judge; and such deputy judge shall have and exercise all such jurisdiction, powers and authority as are possessed by the local judge;

**Tenure of
office.**

(2) The appointment of a deputy judge shall not be determined by the occurrence of a vacancy in the office of the judge;

(3) A local judge in Admiralty may, with the approval of the Governor in Council, at any time revoke the appointment of a deputy judge.

11. The Governor in Council may, from time to time, ^{Surrogate judges.} appoint, for any district or portion of a district, a surrogate judge or judges; and such surrogate judge shall have such jurisdiction, powers and authority, and be paid such fees, as are, from time to time, prescribed by general rules or orders;

(2) A surrogate judge shall hold office during pleasure; ^{Tenure of office.} and his appointment shall not be determined by the occurrence of a vacancy in the office of the local judge of his district.

12. Every deputy and surrogate judge shall, previously ^{Oaths.} to entering on the duties of office, take, before the judge of the Exchequer Court, or the judge of any Superior Court, an oath similar in form to that to be taken by a local judge.

13. Any suit may be instituted in any district registry ^{Where suits may be instituted.} when—

(a) The ship or property, the subject of the suit, is at the time of the institution of the suit within the district of such registry;

(b) The owner or owners of the ship or property, or the owner or owners of the larger number of shares in the ship, or the managing owner or the ship's husband reside at the time of the institution of the suit within the district of such registry;

(c) The port of registry of the ship is within the district of such registry; or—

(d) The parties so agree by a memorandum signed by them or by their attorneys or agents;

Provided always, that when a suit has been instituted in ^{Proviso.} any registry, no further suit shall be instituted in respect of the same matter in any other registry of the Court, without leave of the judge of the Court, and subject to such terms, as to costs and otherwise, as he directs.

14. An appeal may be made to the Exchequer Court from ^{Appeal.} any final judgment, decree or order of any local judge in Admiralty, and, with the permission of such local judge or of the judge of the Exchequer Court, from any interlocutory

decree or order therein, on security for costs being first given, and subject to such other provisions as are prescribed by general rules or orders :

(2) An appeal may, however, be made direct to the Supreme Court of Canada from any final judgment, decree or order of a local judge, subject to the provisions of "The Exchequer Court Act" regarding appeals.

Removal of
suit.

15. Any party to a suit or to an appeal may, at any stage of such suit or appeal, by leave of the Court, and subject to such terms as to costs or otherwise as the Court directs, remove any suit instituted or appeal pending in any registry to any other registry.

Fees, etc.

16. A scale of costs and charges in Admiralty causes in the district registries of the Court, and fees to be taken in such registries, shall be prescribed by general rules or orders.

Provisional
districts and
registries.

17. Until otherwise provided by the Governor in Council, the following provinces shall each constitute an Admiralty district for the purposes of this Act, and a registry of the Exchequer Court on its Admiralty side shall be established and maintained within such districts at the places following, that is to say :

(a) The Province of Quebec shall constitute the district of Quebec, with a registry at the city of Quebec ;

(b) The Province of Nova Scotia shall constitute the district of Nova Scotia, with a registry at the city of Halifax ;

(c) The Province of New Brunswick shall constitute the district of New Brunswick, with a registry at the city of St. John ;

(d) The Province of Prince Edward Island shall constitute the district of Prince Edward Island, with a registry at the city of Charlottetown ; and —

(e) The Province of British Columbia shall constitute the district of British Columbia, with a registry at the city of Victoria.

Toronto dis-
trict.

18. Until otherwise provided by the Governor in Council, there shall be a registry of the Exchequer Court on its Admiralty side at the city of Toronto, and the Governor in

Council may, from time to time, fix the limits of such registry, which shall be known as "The Toronto Admiralty District."

19. Every person who, at the coming into force of "The Colonial Courts of Admiralty Act, 1890," holds in Canada the office of judge of a Vice-Admiralty Court, shall, until his death, resignation or removal from such office or from the office by virtue of which he is such judge of a Vice-Admiralty Court, or until an arrangement is made with him under the seventeenth section of the Act last mentioned, have and exercise, within the Admiralty district corresponding to the limits of his former jurisdiction as such judge of a Court of Vice-Admiralty, all the jurisdiction, powers and authority of a local judge in Admiralty.

As to Judges of Vice-Admiralty Courts.

20. The judge of the Maritime Court of Ontario shall, in like manner and for a like time, have and exercise within the Toronto Admiralty district all the jurisdiction, powers and authority of a local judge in Admiralty.

As to Judge of Maritime Court of Ontario.

21. Every person who, at the coming into force of "The Colonial Courts of Admiralty Act, 1890," is a registrar, marshal or other officer of a Vice-Admiralty Court in Canada, shall, during the pleasure of the Governor in Council, and within the Admiralty district corresponding to the limits of the jurisdiction of such Vice-Admiralty Court, have and exercise the like office in the Exchequer Court in respect of its Admiralty jurisdiction, and shall, subject to any general rule or order, have the like powers and authority, and perform the like duties, as he might have had or performed, as such registrar, marshal or other officer of a Vice-Admiralty Court.

As to Officers of Vice-Admiralty Courts.

22. The registrar and marshal of the Maritime Court of Ontario shall, during the pleasure of the Governor in Council, be the registrar and marshal, respectively, of the Toronto Admiralty district.

As to registrar and marshal of Maritime Court of Ontario.

23. On the coming into force of this Act, the Maritime Court of Ontario shall be abolished, but subject to the following provisions:

Maritime Court of Ontario abolished.

(1) All judgments of such Court shall be executed and may be appealed from in like manner as if this Act had not been passed, and all appeals from such Court pending at the commencement of this Act shall be heard and determined, and the judgment thereon executed as nearly as may be in like manner as if this Act had not been passed;

(2) All proceedings pending in such Court at the commencement of this Act shall be continued in the district registry corresponding to that in which they were instituted or are now pending;

(3) The procedure and practice (including fees and costs) now in force in such Court shall, until otherwise provided by general rule or order, be followed, as nearly as may be, in any proceeding now pending in such Court or hereafter instituted in the registry of any Admiralty district in the Province of Ontario;

(4) The provisions of the fifth and sixth sub-sections of the fourteenth section of "The Maritime Court Act" shall apply to any proceeding instituted in the registry of any Admiralty district in the province of Ontario.

Construction. 24. Nothing in sections five to twenty-two of this Act, both inclusive, shall limit, lessen or impair the jurisdiction of the judge of the Exchequer Court in respect of the Admiralty jurisdiction of the Court, or otherwise.

Rules of Court. 25. Any rules or orders of Court made by the Exchequer Court of Canada for regulating the procedure and practice therein (including fees and costs), in the exercise of the jurisdiction conferred by "The Colonial Courts of Admiralty Act, 1890," and this Act, which requires the approval of Her Majesty in Council, shall be submitted to the Governor in Council for his approval, and, if approved by him, shall be transmitted to Her Majesty in Council for her approval.

Commencement of Act. 26. This Act shall not come into force until Her Majesty's pleasure thereon has been signified by proclamation in the *Canada Gazette*.

Certified copy of a Report of a Committee of the Honorable the Privy Council, approved by His Excellency the Governor-General in Council, on the 10th December, 1892.

On a report dated 6th December, 1892, from the Minister of Justice submitting for Your Excellency's consideration certain general rules and orders, made by the judge of the Exchequer Court of Canada on the 5th December instant, for regulating the practice and procedure in that Court in Admiralty cases. These rules and orders, under the provisions of section 25 of "The Admiralty Act, 1891," require the approval of Your Excellency in Council, and under the provisions of section 7 of "The Colonial Courts of Admiralty Act, 1890," they will not come into operation until they have been approved also by Her Majesty in Council.

The minister is of opinion that they are such as should receive approval of Your Excellency in Council, and he recommends accordingly.

The minister further recommends that a copy of them be transmitted to the Right Honorable Her Majesty's Principal Secretary of State for the Colonies, with a request that he will cause them to be submitted to Her Majesty in Council for approval.

The minister further suggests that in the despatch transmitting these rules and orders attention be called, with a view to such action thereunder as to Her Majesty in Council may seem proper, to the provisions of sub-section 2 of section 7 of "The Colonial Courts of Admiralty Act," under which Her Majesty in Council may, in approving rules made under the section, declare that rules with respect to any matters which appear to Her Majesty to be matters of detail or of local concern may be revoked, varied, or added to, without the approval required by the section.

The committee advise that Your Excellency be moved to take action in the sense of the recommendation of the Minister of Justice.

All of which is respectfully submitted for Your Excellency's approval.

JOHN J. MCGEE,

Clerk of the Privy Council.

To the Honorable The Minister of Justice.

VICE-ADMIRALTY REPORTS.

DOWNING STREET, 6th April, 1893.

My Lord—I have the honor to transmit to you, with reference to your despatch, No. 331, of the 14th of December, an Order of Her Majesty in Council approving the Rules of Court regulating the practice and procedure in Admiralty cases in the Exchequer Court of Canada.

I have, etc.,

(Sd.) R. H. MEADE,
For the S. of S.

The Officer Administering
The Government of Canada.

| Date. | Description of Document. |
|-----------------|--|
| 15th March..... | Order of Her Majesty in Council, (Four spare copies.) |

AT THE COURT AT WINDSOR.

The 15th day of March, 1893.

PRESENT :

THE QUEEN'S MOST EXCELLENT MAJESTY.

LORD PRESIDENT,
LORD CHAMBERLAIN,
MR. BRYCE.

Whereas there was this day read at the Board a Memorial from the Right Honorable the Lords Commissioners of the Admiralty, dated the 24th day of February, 1893, in the words following, viz. :

“Whereas by an Act passed in the fifty-fourth year of Your Majesty's reign, entitled ‘The Colonial Courts of Admiralty Act, 1890,’ it was, amongst other things, provided that Rules of Court for regulating the procedure and practice (including fees and costs) in a Court in a British possession in the exercise of the jurisdiction conferred by this Act, whether original or appellate, may be made by the same

authority and in the same manner as rules touching the practice, procedure, fees and costs in the said Court in the exercise of its ordinary civil jurisdiction respectively, are made, but that such Rules of Court shall not come into operation until they have been approved by Your Majesty in Council, but on coming into operation shall have full effect as if enacted in the said Act.

“And whereas it appears to us and to Your Majesty’s Secretary of State for the Colonies to be expedient that the Rules of Court hereto annexed, having been duly prepared by the proper authority as required by the said Act, should be established and be in force in the Exchequer Court of Canada in its Admiralty jurisdiction.

“And whereas the provisions of sub-section 2 of section 7 of the aforesaid Act empower Your Majesty in Council in approving rules made under this section to declare that the rules so made with respect to any matters which appear to Your Majesty to be matters of detail or of local concern may be revoked, varied, or added to, without the approval required by this section.

“And whereas it appears to us that rules 158 to 176 relating to appeals from the judgment or order of a local Judge in Admiralty to the Exchequer Court; Rule 224, as to cases in which half fees only should be allowed; and the Tables of Fees appended to the Rules should be considered to come within the scope of the sub-section in question, and be declared to be subject to revocation, variation, or addition, without the approval of Your Majesty in Council.

“Now, therefore, we beg leave humbly to recommend that Your Majesty will be graciously pleased by Your Order in Council to direct that the Rules of Court hereto annexed shall be the Rules of Court for the said Exchequer Court of Canada in its Admiralty jurisdiction, and shall be established and be in force in the said Court, and to declare that Rules 158 to 176 (both inclusive), Rule 224, and the Tables of Fees appended to the Rules, may be revoked, varied or added to without the approval of Your Majesty in Council.”

Her Majesty, having taken the said Memorial into consideration, was pleased, by and with the advice of Her

Privy Council to approve of what is therein proposed, and to direct that the Rules of Court hereto annexed shall be the Rules of Court for the said Exchequer Court of Canada in its Admiralty jurisdiction and shall be established and be in force in the said Court, and to declare that Rules 158 to 176 (both inclusive), Rule 224, and the Tables of Fees appended to the Rules, may be revoked, varied, or added to without the approval of Her Majesty in Council. And the Right Honorable the Lords Commissioners of the Admiralty are to give the necessary direction herein accordingly.

C. L. PEEL.

GENERAL RULES AND ORDERS
REGULATING THE
PRACTICE AND PROCEDURE
IN
ADMIRALTY CASES IN THE EXCHEQUER COURT OF CANADA.

In pursuance of the provisions of "The Colonial Courts of Admiralty Act, 1890" and of "The Admiralty Act, 1891," (Canada), it is ordered that the following rules of Court for regulating the practice and procedure (including fees and costs) of the Exchequer Court of Canada in the exercise of its jurisdiction, powers and authority as a Court of Admiralty shall be in force in the said Court.

1. In the construction of these rules, and of the forms and tables of fees annexed thereto, the following terms shall (if not inconsistent with the context or subject-matter) have the respective meanings hereinafter assigned to them; that is to say:

- (a) Words importing the singular number include the plural number, and words importing the plural number include the singular number;
- (b) Words importing the masculine gender include females;
- (c) "District" shall mean an Admiralty district constituted by or by virtue of "The Admiralty Act, 1891"; and in respect of proceedings in the registry of the Court at Ottawa shall include the whole of Canada;
- (d) "Court" or "Exchequer Court" shall mean the Exchequer Court of Canada;
- (e) "Registry" shall mean the registry of the Court, or any district registry thereof;

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- (f) "Judge" shall mean the judge of the Court, or a local judge in admiralty of the Court, or any person lawfully authorized to act as judge thereof;
- (g) "Registrar" shall mean the registrar of the Court, or any deputy, assistant or district registrar thereof;
- (h) "Marshal" shall mean the marshal of the Court, or any deputy, assistant or district marshal thereof, or any sheriff or coroner authorized to perform the duties and functions of a sheriff in connection with the Court;
- (i) "Action" shall mean any action, cause, suit, or other proceeding instituted in the Court;
- (j) "Counsel" shall mean any advocate, barrister-at-law, or other person entitled to practise in the Court;
- (k) "Solicitor" shall mean any proctor, solicitor or attorney entitled to practise in the Court;
- (l) "Plaintiff" shall include the plaintiff's solicitor, if he sues by a solicitor;
- (m) "Defendant" shall include the defendant's solicitor, if he appears by a solicitor;
- (n) "Party" shall include the party's solicitor, if he sues or appears by a solicitor;
- (o) "Person" or "party" shall include a body corporate or politic;
- (p) "Ship" shall include every description of vessel used in navigation not propelled by oars only;
- (q) "Month" shall mean calendar month.

ACTIONS.

2. Actions shall be of two kinds, actions *in rem* and actions *in personam* (1).

3. Actions for condemnation of any ship, boat, cargo, proceeds, slaves, or effects, or for recovery of any pecuniary forfeiture or penalty, shall be instituted in the name of the Crown.

(1) *The Volant*, 1 W. Rob. 387.
The Hope, 1 W. Rob. 154.
The Orient, L. R. 3 P. C. 696.

The Zephyr, 11 L. T. N. S. 351.
The Dictator (1892), P. 64.
 Note to *The St. Cloud*, *ante* p. 155

4. All actions shall be entitled in the Court, and shall be numbered in the order in which they are instituted, and the number given to any action shall be the distinguishing number of the action, and shall be written or printed on all documents in the action as part of the title thereof. Forms of the title of the Court and of the title of an action will be found in the Appendix hereto, Nos. 1, 2, 3 and 4.

WRIT OF SUMMONS.

5. Every action shall be commenced by a writ of summons which, before being issued, shall be indorsed with a statement of the nature of the claim, and of the relief or remedy required, and of the amount claimed, if any. Forms of writ of summons and of the indorsements thereon will be found in the Appendix hereto, Nos. 5, 6, 7, 9 and 10 (1).

6. In an action for seaman's or master's wages, or for master's wages and disbursements, or for necessities, or for bottomry, or in any mortgage action, or in any action in which the plaintiff desires an account, the indorsement on the writ of summons may include a claim to have an account taken.

7. The writ of summons shall be indorsed with the name and address of the plaintiff, and with an address to be called an address for service, not more than three miles from the registry, at which it shall be sufficient to leave all documents required to be served upon him.

8. The writ of summons shall be prepared and indorsed by the plaintiff, and shall be issued under the seal of the Court, and a copy of the writ and of all the indorsements thereon, signed by the plaintiff, shall be left in the registry at the time of sealing the writ.

9. The judge may allow the plaintiff to amend the writ of summons and the indorsements thereon in such manner and on such terms as to the judge shall seem fit (2).

(1) *The John Bellamy*, L. R. 3 A. & E. 129. *The W. A. Sholten*, 13 P. D. 8.
 (2) *The Duke of Buccleuch* (1892) P. 201.
The Princess Royal, L. R. 3 A. & E. 27; *The Vivar*, 2 P. D. 29.

SERVICE OF WRIT OF SUMMONS.

10. In an action *in rem*, the writ of summons shall be served—

- (a) Upon ship, or upon cargo, freight, or other property, if the cargo or other property is on board a ship, by attaching the writ for a short time to the main-mast or the single mast, or to some other conspicuous part of the ship, and by leaving a copy of the writ attached thereto;
- (b) Upon cargo, freight, or other property, if the cargo or other property is not on board a ship, by attaching the writ for a short time to such cargo or property, and by leaving a copy of the writ attached thereto;
- (c) Upon freight in the hands of any person, by showing the writ to him and by leaving with him a copy thereof;
- (d) Upon proceeds in Court, by showing the writ to the registrar and by leaving with him a copy thereof.

11. If access cannot be obtained to the property on which it is to be served, the writ may be served by showing it to any person appearing to be in charge of such property, and by leaving with him a copy of the writ.

12. In an action *in personam*, the writ of summons shall be served by showing it to the defendant, and by leaving with him a copy of the writ.

13. A writ of summons against a firm may be served upon any member of the firm, or upon any person appearing at the time of service to have the management of the business of the firm.

14. A writ of summons against a corporation may be served upon the mayor, or other head officer, or upon the town clerk, clerk, treasurer or secretary of the corporation and a writ of summons against a public company may be served upon the secretary of the company, or may be left at the office of the company.

15. A writ of summons against a corporation or a public company may be served in any other mode provided by law

for service of any other writ or legal process upon such corporation or company.

16. If the person to be served is under disability, or if for any cause personal service cannot, or cannot promptly be effected, or if in any action, whether *in rem* or *in personam*, there is any doubt or difficulty as to the person to be served, or as to the mode of service, the judge may order upon whom, or in what manner service is to be made, or may order notice to be given in lieu of service.

17. The writ of summons, whether *in rem* or *in personam*, may be served by the plaintiff or his agent within twelve months from the date thereof, and shall, after service, be filed with an affidavit of such service (1).

18. The affidavit shall state the date and mode of service and shall be signed by the person who served the writ. A form of affidavit of service will be found in the Appendix hereto, No. 11.

19. No service of a writ or warrant shall be required when the defendant by his solicitor undertakes in writing to accept service thereof and enter an appearance thereto, or to put in bail, or to pay money into Court in lieu of bail; and any solicitor not entering an appearance or putting in bail or paying money into Court in lieu of bail in pursuance of his written undertaking so to do, shall be liable to attachment.

SERVICE OUT OF JURISDICTION.

20. Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the judge whenever:

- (a) Any relief is sought against any person domiciled or ordinarily resident within the territorial jurisdiction of the Court;
- (b) The action is founded on any breach or alleged breach within the territorial jurisdiction of the Court of any contract wherever made, which according to the terms thereof ought to be performed within such jurisdiction;

(1) *The Solis*, 10 P. D. 62.

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- (c) Any injunction is sought as to anything to be done within the territorial jurisdiction of the Court.
- (d) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within such territorial jurisdiction.

21. Every application for leave to serve a writ of summons, or notice of a writ of summons, on a defendant out of the jurisdiction shall be supported by affidavit, or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the judge that the case is a proper one for service out of the jurisdiction.

22. Any order giving leave to effect such service, or give such notice, shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country, where or within which, the writ is to be served or the notice given.

23. When the defendant is neither a British subject nor in British dominions, notice of the writ, and not the writ itself, is to be served upon him. A form of notice will be found in the Appendix hereto, No. 8.

24. Notice in lieu of service shall be given in the manner in which writs of summons are served.

APPEARANCE.

25. A party appearing to a writ of summons shall file an appearance at the place directed in the writ (1).

26. A party not appearing within the time limited by the writ may, by consent of the other parties or by permission of the judge, appear at any time on such terms as the judge shall order.

(1) *The Blakeney*, Swa. 428; 5 Jur. N. S. 418.

The Seaward, 3 E. C. R. 264.
The Vivar, 2 P. D. 29.

27. If the party appearing has a set-off or counter-claim against the plaintiff, he may indorse on his appearance a statement of the nature thereof, and of the relief or remedy required, and of the amount, if any, of the set-off or counter-claim. But if in the opinion of the judge such set-off or counter-claim cannot be conveniently disposed of in the action, the judge may order it to be struck out (1).

28. The appearance shall be signed by the party appearing, and shall state his name and address, and an address, to be called an address for service, not more than three miles from the registry, at which it shall be sufficient to leave all documents required to be served upon him. Forms of Appearance and of Indorsement of set-off or counter-claim will be found in the Appendix hereto, Nos. 12 and 13.

PARTIES.

29. Any number of persons having interests of the same nature arising out of the same matter may be joined in the same action whether as plaintiffs or as defendants (2).

30. The judge may order any person who is interested in the action, though not named in the writ of summons, to come in either as plaintiff or as defendant.

31. For the purposes of the last preceding rule an underwriter or insurer shall be deemed to be a person interested in the action.

32. The judge may order upon what terms any person shall come in, and what notices and documents, if any, shall be given to and served upon him, and may give such further directions in the matter as to him shall seem fit.

CONSOLIDATION OF ACTIONS.

33. Two or more actions in which the questions at issue are substantially the same, or for matters which might properly be combined in one action, may be consolidated by

(1) *The Ruby*, 15 P. D. 139.

The Diana, 31 L. T. N. S. 203.

(2) *The Dowthorpe*, 2 W. Rob. 73.

The Union, Lush. 128.

The Julinder, Spinks 75.

order of the judge upon such terms as to him shall seem fit (1).

34. The judge, if he thinks fit, may order several actions to be tried at the same time, and on the same evidence, or the evidence in one action to be used as evidence in another, or may order one of several actions to be tried as a test action, and the other actions to be stayed to abide the result.

WARRANTS.

35. In an action *in rem*, a warrant for the arrest of property may be issued by the registrar at the time of, or at any time after, the issue of the writ of summons, on an affidavit being filed, as prescribed by the following rules. A form of affidavit to lead warrant will be found in the Appendix hereto, No. 14 (2).

36. The affidavit shall state the nature of the claim, and that the aid of the Court is required.

37. The affidavit shall also state—

- (a) In an action for wages, or possession, the national character of the ship, and if the ship is foreign, that notice of the action has been served upon a consular officer of the State to which the ship belongs, if there is one resident in the district within which the ship is at the time of the institution of the suit; and a copy of the notice shall be annexed to the affidavit;
- (b) In an action for necessities, the national character of the ship, and that, to the best of the deponent's belief, no owner or part owner of the ship was domiciled within Canada at the time when the necessities were supplied;
- (c) In an action for building, equipping, or repairing any ship, the national character of the ship and that at the time of the institution of the action, the ship, or the proceeds thereof, are under the arrest of the Court;

- (1) *The William Hutt*, Lush. 25. *The Cosmopolitan*, 9 P. D. 35;
The Melpomene, L. R. 4 A. & E. Wm. & Br. 386 (ed. 1886).
- 129. *The Margaret Jane*, L. R. 2 A.
(2) *The Volant*, Br. & Lush. 321. & E. 345.

(d) In an action between co-owners relating to the ownership, possession, employment, or earnings of any ship registered in such district, the port at which the ship is registered and the number of shares in the ship owned by the party proceeding.

38. In an action for bottomry, the bottomry bond in original, and, if it is in a foreign language, a translation thereof, shall be produced for the inspection and perusal of the registrar, and a copy of the bond, or of the translation thereof, certified to be correct, shall be annexed to the affidavit (1).

39. The registrar, if he thinks fit, may issue a warrant, although the affidavit does not contain all the prescribed particulars, and, in an action for bottomry, although the bond has not been produced; or he may refuse to issue a warrant without the order of the judge.

40. The warrant shall be prepared in the registry, and shall be signed by the registrar, and issued under the seal of the Court. A form of warrant will be found in the Appendix hereto, No. 15.

41. The warrant shall be served by the marshal, or his officer, in the manner prescribed by these rules for the service of a writ of summons in an action *in rem*, and thereupon the property shall be deemed to be arrested.

42. The warrant may be served on Sunday, Good Friday, or Christmas Day, or any public holiday, as well as on any other day.

43. The warrant shall be filed by the marshal within *one week* after service thereof has been completed, with a certificate of service indorsed thereon.

44. The certificate shall state by whom the warrant has been served, and the date and mode of service, and shall be signed by the marshal. A form of certificate of service will be found in the Appendix hereto, No. 16 (2).

(1) *The Eudora*, 4 P. D. 208.

(2) *The Cella*, 13 P. D. 82.

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BAIL.

45. Whenever bail is required by these rules, it shall be given by filing one or more bailbonds, each of which shall be signed by two sureties, unless the judge shall, on special cause shown, order that one surety shall suffice (1).

46. Every bailbond shall be signed before the registrar, or by his direction before a clerk in the registry, or before a commissioner having authority to take acknowledgements or recognizances of bail in the court, or before a commissioner appointed by the Court, to take bail. Forms of bailbond and commission to take bail will be found in the Appendix hereto, Nos. 17 and 18.

47. The sureties shall justify by affidavit and may attend to sign a bond either separately or together. A form of affidavit of justification will be found in the Appendix hereto, No. 19 (2).

48. The commissioner to take bail and the affidavits of justification shall, with the bailbond, when executed, be returned to the registry by the commissioner.

49. No commissioner shall be entitled to take bail in any action in which he, or any person in partnership with him, is acting as solicitor or agent.

50. Before filing a bailbond, notice of bail shall be served upon the adverse party, and a certificate of such service shall be indorsed on the bond by the party filing it. A form of Notice of Bail will be found in the Appendix hereto, No. 20.

51. If the adverse party is not satisfied with the sufficiency of any surety, he may file a notice of objection to such surety. A form of notice of Objection to Bail will be found in the Appendix hereto, No. 21.

52. Upon such objection being filed with the registrar an appointment may be obtained for its consideration before

(1) *The Keroula*, 11 P. D. 92.
The St. Olaf, L. R. 2 A. & E. 360.
The George Gordon, 9 P. D. 46.

The Freedom, L. R. 3 A. & E. 495.
The Don Ricardo, 5 P. D. 121.
(2) *The Corner*, Br. & Lush. 161.

him. Twenty-four hours' notice of such appointment shall be given to the plaintiff unless the judge for special reasons allows a shorter notice to be given; and, on the return of the appointment, the registrar may hear the parties and any evidence they may adduce regarding the sufficiency of the sureties; and he may direct such sureties to submit themselves to cross-examination on their affidavits of justification; and he may allow or disallow the bond. He may adjourn the appointment from time to time if he thinks necessary, and shall himself make such inquiries respecting the sureties as he thinks fit.

RELEASES.

53. A release for property arrested by warrant may be issued by order of the judge.

54. A release may also be issued by the registrar, unless there is a caveat outstanding against the release of the property,—

- (a) On payment into Court of the amount claimed, or of the appraised value of the property arrested, or, where cargo is arrested for freight only, of the amount of the freight verified by affidavit;
- (b) On one or more bailbonds being filed for the amount claimed, or for the appraised value of the property arrested, and on the allowance of the same if objected to; or if not objected to, on proof that *twenty-four hours'* notice of the names and addresses of the sureties has been previously served on the party at whose instance the property has been arrested;
- (c) On the application of the party at whose instance the property has been arrested;
- (d) On a consent in writing being filed signed by the party at whose instance the property has been arrested;
- (e) On discontinuance or dismissal of the action in which the property has been arrested.

55. Where property has been arrested for salvage, the release shall not be issued under the foregoing rule, except on discontinuance or dismissal of the action, until the value

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of the property arrested has been agreed upon between the parties or determined by the judge.

56. The registrar may refuse to issue a release without the order of the judge.

57. The release shall be prepared in the registry, and shall be signed by the registrar, and issued under the seal of the Court. A form of release will be found in the Appendix hereto, No. 22.

58. The release shall be served on the marshal, either personally, or by leaving it at his office, by the party by whom it is taken out.

59. On service of the release and on payment to the marshal of all fees due to, and charges incurred by him, in respect of the arrest and custody of the property, the property shall be at once released from arrest.

PRELIMINARY ACTS.

60. In an action for damage by collision, each party shall, within *one week* from an appearance being entered, file a Preliminary Act, sealed up, signed by the party, and containing a statement of the following particulars (1):

- (1) The names of the ships which came into collision, and the names of their masters;
- (2) The time of the collision;
- (3) The place of the collision;
- (4) The direction and force of the wind;
- (5) The state of the weather;
- (6) The state and force of the tide, or, if the collision occurred in non-tidal waters, of the current;
- (7) The course and speed of the ship when the other was first seen;
- (8) The lights, if any, carried by her;
- (9) The distance and bearing of the other ship when first seen;

(1) *The Vortigern*, Swa. 518.
The John Boyne, 36 L. T. N.
 S. 29.

The Miranda, 7 P. D. 185.
The Godiva, 11 P. D. 20; see
ante, p. 103.

- (10) The lights, if any, of the other ship which were first seen ;
- (11) The lights, if any, of the other ship, other than those first seen, which came into view before the collision ;
- (12) The measures which were taken, and when, to avoid the collision ;
- (13) The parts of each ship which first came into collision ;
- (14) What fault or default, if any, is attributed to the other ship (1).

PLEADINGS.

61. Every action shall be heard without pleadings, unless the judge shall otherwise order.

62. If an order is made for pleadings, the plaintiff shall, within *one week* from the date of the order, file his statement of claim, and, within *one week* from the filing of the statement of claim, the defendant shall file his statement of defence, and within *one week* from the filing of the statement of defence the plaintiff shall file his reply, if any ; and there shall be no pleading beyond the reply, except by permission of the judge (2).

63. The defendant may, in his statement of defence, plead any set-off or counter-claim. But if, in the opinion of the judge, such set-off or counter-claim cannot be conveniently disposed of in the action, the judge may order it to be struck out.

64. Every pleading shall be divided into short paragraphs, numbered consecutively, which shall state concisely the facts on which the party relies ; and shall be signed by the party filing it. Forms of pleadings will be found in the Appendix hereto, No. 23.

65. It shall not be necessary to set out in any pleading the words of any document referred to therein, except so far as the precise words of the document are material.

66. Either party may apply to the judge to decide forthwith any question of fact or of law raised by any pleading,

(1) Sub-section 14 is new.

The Isis, 8 P. D. 227.

(2) *The North American*, Swa. 359.

See *ante*, pp. 115, 154.

The Marpesia, L. R. 4 P. C. 212.

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and the judge shall thereupon make such order as to him shall seem fit.

67. Any pleading may at any time be amended, either by consent of the parties, or by order of the judge.

INTERROGATORIES.

68. At any time before the action is set down for hearing any party, desirous of obtaining the answers of the adverse party on any matters material to the issue, may apply to the judge for leave to administer interrogatories to the adverse party to be answered on oath, and the judge may direct within what time and in what way they shall be answered, whether by affidavit or by oral examination.

69. The judge may order any interrogatory that he considers objectionable to be amended or struck out; and if the party interrogated omits to answer or answers insufficiently, the judge may order him to answer, or to answer further, and either by affidavit or by oral examination. Forms of interrogatories and of answers will be found in the Appendix hereto, Nos. 24 and 25 (1).

DISCOVERY AND INSPECTION.

70. The judge may order any party to an action to make discovery, on oath, of all documents which are in his possession or power relating to any matter in question therein.

71. The affidavit of discovery shall specify which, if any, of the documents therein mentioned the party objects to produce. A form of affidavit of discovery will be found in the Appendix hereto, No. 26.

72. Any party to an action may file a notice to any other party to produce, for inspection or transcription, any document in his possession or power relating to any matter in question in the action. A form of notice to produce will be found in the Appendix hereto, No. 27.

73. If the party served with notice to produce omits or refuses to do so within the time specified in the notice, the

(1) *The Isle of Cyprus*, 15 P. D. 134.

adverse party may apply to the judge for an order to produce.

ADMISSION OF DOCUMENTS AND FACTS.

74. Any party may file a notice to any other party to admit any document or fact (saving all just exceptions), and a party not admitting it after such notice shall be liable for the costs of proving the document or fact, whatever the result of the action may be, unless the taxing officer is of opinion that there was sufficient reason for not admitting it. Forms of notice to admit will be found in the Appendix hereto, Nos. 28 and 29.

75. No costs of proving any document shall be allowed, unless notice to admit shall have been previously given, or the taxing officer shall be of opinion that the omission to give such notice was reasonable and proper.

SPECIAL CASE.

76. Parties may agree to state the questions at issue for the opinion of the judge in the form of a special case.

77. If it appears to the judge that there is in any action a question of law which it would be convenient to have decided in the first instance, he may direct that it shall be raised in a special case or in such other manner as he may deem expedient.

78. Every special case shall be divided into paragraphs, numbered consecutively, and shall state concisely such facts and documents as may be necessary to enable the judge to decide the question at issue.

79. Every special case shall be signed by parties, and may be filed by any party.

MOTIONS.

80. A party desiring to obtain an order from the judge shall file a notice of motion with the affidavits, if any, on which he intends to rely.

81. The notice of motion shall state the nature of the order desired, the day on which the motion is to be made,

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and whether in Court or in Chambers. A form of notice of motion will be found in the Appendix hereto, No. 30.

82. Except by consent of the adverse party, or by order of the judge, the notice of motion shall be filed *twenty-four hours* at least before the time at which the motion is made.

83. When the motion comes on for hearing, the judge, after hearing the parties, or, in the absence of any of them, on proof that the notice of motion has been duly served, may make such order as to him shall seem fit.

84. The judge may, on due cause shown, vary or rescind any order previously made.

TENDERS.

85. A party desiring to make a tender in satisfaction of the whole or any part of the adverse party's claim, shall pay into Court the amount tendered by him, and shall file a notice of the terms on which the tender is made. But the payment of money into Court shall not be deemed an admission of the cause of action in respect of which it is paid (1).

86. Within *a week* from the filing of the notice the adverse party shall file a notice, stating whether he accepts or rejects the tender, and if he shall not do so, he shall be held to have rejected it. Forms of notice of tender and of notice accepting or rejecting it will be found in the Appendix hereto, Nos. 31 and 32.

87. Pending the acceptance or rejection of a tender, the proceedings shall be suspended.

EVIDENCE.

88. Evidence shall be given either by affidavit or by oral examination, or partly in one mode and partly in another (2).

89. Evidence on a motion shall in general be given by affidavit, and at the hearing by the oral examination of

(1) *The Hickman*, L. R. 3 A. & E. 15.

The Lotus, 7 P. D. 199.

The Thracian, L. R. 3 A. & E.

(2) *The Peerless*, Lush. p. 41.

witnesses; but the mode or modes in which evidence shall be given, either on any motion or at the hearing, may be determined either by consent of the parties, or by order of the judge.

90. The judge may order any person who has made an affidavit in an action to attend for cross-examination thereon before the judge, or the registrar, or a commissioner specially appointed.

91. Witnesses examined orally before the judge, the registrar, or a commissioner, shall be examined, cross-examined, and re-examined in such order as the judge, registrar or commissioner may direct; and questions may be put to any witness by the judge, registrar, or commissioner as the case may be.

92. If any witness is examined by interpretation, such interpretation shall be made by a sworn interpreter of the Court, or by a person previously sworn according to the form in the Appendix hereto, No. 33.

OATHS.

93. The judge may appoint any person to administer oaths in Admiralty proceedings generally, or in any particular proceedings. Forms of appointments to administer oaths will be found in the Appendix hereto, No. 34.

94. If any person tendered for the purpose of giving evidence objects to take an oath, or is objected to as incompetent to take an oath, or is by reason of any defect of religious knowledge or belief incapable of comprehending the nature of an oath, the judge or person authorized to administer the oath shall, if satisfied that the taking of an oath would have no binding effect on his conscience, permit him, in lieu of an oath, to make a declaration. Forms of oath, and of declaration in lieu of oath will be found in the Appendix hereto, Nos. 35 and 36.

AFFIDAVITS.

95. Every affidavit shall be divided into short paragraphs numbered consecutively, and shall be in the first person (1).

(1) *The Hanna*, 3 Asp. N. S. 503.

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96. The name, address, and description of every person making an affidavit shall be inserted therein.

97. The names of all the persons making an affidavit, and the dates when, and the places where it is sworn, shall be inserted in the jurat.

98. When an affidavit is made by any person who is blind, or who, from his signature or otherwise appears to be illiterate, the person before whom the affidavit is sworn shall certify that the affidavit was read over to the deponent, and that the deponent appeared to understand the same, and made his mark or wrote his signature thereto in the presence of the person before whom the affidavit was sworn.

99. When an affidavit is made in English by a person who does not speak the English language, or in French by a person who does not speak the French language, the affidavit shall be taken down and read over to the deponent by interpretation either of a sworn interpreter of the Court, or of a person previously sworn faithfully to interpret the affidavit. A form of jurat will be found in the Appendix hereto, No. 37.

100. Affidavits may, by permission of the judge, be used as evidence in an action, saving all just exceptions—

- (1) If sworn to in the United Kingdom of Great Britain and Ireland, or in any British possession, before any person authorized to administer oaths in the said United Kingdom or in such possession respectively;
- (2) If sworn to in any place not being a part of Her Majesty's dominions, before a British minister, consul, vice-consul, or notary public, or before a judge or magistrate, the signature of such judge or magistrate being authenticated by the official seal of the Court to which he is attached.

101. The reception of any affidavit as evidence may be objected to, if the affidavit has been sworn before the solicitor for the party on whose behalf it is offered, or before a partner or clerk of such solicitor.

EXAMINATION OF WITNESSES BEFORE TRIAL.

102. The judge may order that any witness, who cannot conveniently attend at the trial of the action, shall be examined previously thereto, before either the judge or the registrar, who shall have power to adjourn the examination from time to time, and from place to place, if he shall think necessary. A form of order for examination of witnesses will be found in the Appendix hereto, No. 38.

103. If the witness cannot be conveniently examined before the judge or the registrar, or is beyond the limits of the district, the judge may order that he shall be examined before a commissioner specially appointed for the purpose.

104. The commissioner shall have power to swear any witnesses produced before him for examination, and to adjourn if necessary, the examination from time to time, and from place to place. A form of commission to examine witnesses will be found in the Appendix hereto, No. 39.

105. The parties, their counsel and solicitors, may attend the examination, but, if counsel attend, the fees of only one counsel on each side shall be allowed on taxation, except by order of the judge.

106. The evidence of every witness shall be taken down in writing, and shall be certified as correct or approved of by the judge, or registrar, or by the commissioner, as the case may be.

107. The certified evidence shall be lodged in the registry, or, if taken by commission, shall forthwith be transmitted by the commissioner to the registry, together with his commission. A form of return to commission to examine witnesses will be found in the Appendix hereto, No. 40.

108. As soon as the certified evidence has been received in the registry, it may be taken up and filed by either party, and may be used as evidence in the action, saving all just exceptions.

SHORTHAND WRITERS.

109. The judge may order the evidence of the witnesses whether examined before the judge, or the registrar, or a

commissioner, to be taken down by a shorthand writer, who shall have been previously sworn faithfully to report the evidence, and a transcript of the shorthand writer's notes, certified by him to be correct and approved by the judge, registrar, or commissioner, as the case may be, shall be lodged in or transmitted to the registry as the certified evidence of such witnesses. The shorthand writer shall, in addition to such transcript thereof, supply the registrar three copies of such transcript, one of which shall be handed to the judge and the others given to the plaintiff and defendant respectively. A form of oath to be administered to the shorthand writer will be found in the Appendix hereto, No. 41.

PRINTING.

110. The judge may order that the whole of the pleadings and written proofs, or any part thereof, shall be printed before the trial; and the printing shall be in such manner and form as the judge shall order.

111. Preliminary Acts, if printed, shall be printed in parallel columns.

ASSESSORS.

112. The judge, on the application of any party, or without any such application if he considers that the nature of the case requires it, may appoint one or more assessors to advise the Court upon any matters requiring nautical or other professional knowledge (1).

113. The fees of the assessors shall be paid in the first instance by the plaintiff, unless the judge shall otherwise order.

SETTING DOWN FOR TRIAL..

114. An action shall be set down for trial by filing a notice of trial. A form of notice of trial will be found in the Appendix hereto, No. 42.

115. If there has not been any appearance, the plaintiff may set down the action for trial, on obtaining from the judge leave to proceed *ex parte*—

(1) *The Magna Charta*, 25 L. T. N. *The Aid*, 6 P. D. 84.
S. 512; Wm. & Br. (ed. 1886), p. 442.

- (a) In an action *in personam*, or an action against proceeds in Court, after the expiration of *two weeks* from the service of the writ of summons;
- (b) In an action *in rem* (not being an action against proceeds in Court), after the expiration of *two weeks* from the filing of the warrant.

116. If there has been an appearance, either party may set down the action for trial —

- (a) After the expiration of *one week* from the entry of the appearance, unless an order has been made for pleadings, or an application for such an order is pending;
- (b) If pleadings have been ordered, when the last pleading has been filed, or when the time allowed to the adverse party for filing any pleading has expired without such pleading having been filed.

In collision cases the Preliminary Acts may be opened as soon as the action has been set down for trial.

117. Where the writ of summons has been indorsed with a claim to have an account taken, or the liability has been admitted or determined, and the question is simply as to the amount due, the judge may, on the application of either party, fix a time within which the accounts and vouchers, and the proofs in support thereof, shall be filed, and at the expiration of that time either party may have the matter set down for trial.

TRIAL.

118. After the action has been set down for trial, any party may apply to the judge, on notice to any other party appearing, for an order fixing the time and place of trial; or he may, upon giving the opposite party ten days' notice, set the action down for trial at any sitting of the Court duly appointed to be held by the judge.

119. At the trial of a contested action the plaintiff shall in general begin. But if the burden of proof lies on the defendant, the judge may direct the defendant to begin (1).

(1) *The John Owen*, 5 Can. L. T. 565
The Otter, L. R. 4 A. & E. 203.

The Benmore, *ibid* 132.

120. If there are several plaintiffs or several defendants, the judge may direct which plaintiff or which defendant shall begin.

121. The party beginning shall first address the Court, and then produce his witnesses, if any. The other party or parties shall then address the Court, and produce their witnesses, if any, in such order as the judge may direct, and shall have a right to sum up their evidence. In all cases the party beginning shall have the right to reply, but shall not produce further evidence, except by permission of the judge.

122. Only one counsel shall in general be heard on each side; but the judge, if he considers that the nature of the case requires it, may allow two counsel to be heard on each side (1).

123. If the action is uncontested, the judge may, if he thinks fit, give judgment on the evidence adduced by the plaintiff.

REFERENCES.

124. The judge may, if he thinks fit, refer the assessment of damages and the taking of any account to the registrar, either alone, or assisted by one or more merchants as assessors (2).

125. The rules as to evidence, and as to the trial, shall apply *mutatis mutandis* to a reference to the registrar, and the registrar may adjourn the proceedings from time to time, and from place to place, if he shall think necessary.

126. Counsel may attend the hearing of any reference, but the costs so incurred shall not be allowed on taxation unless the registrar shall certify that the attendance of counsel was necessary.

127. When a reference has been heard, the registrar shall draw up a report in writing of the result, showing the

(1) *The Mammoth*, 9 P. D. 126.

(2) Questions of law cannot be referred. *The Ocean*, 10 Jur. 506; but the registrar may be directed to observe particular principles of law. *The St. Cloud*, Br. & Lush. 19.

amount, if any, found due, and to whom, together with any further particulars that may be necessary. A form of the report will be found in the Appendix hereto, No. 43.

128. When the report is ready, notice shall be sent to the parties, and either party may thereupon take up and file the report.

129. Within *two weeks* from the filing of the registrar's report, either party may file a notice of motion to vary the report, specifying the items objected to.

130. At the hearing of the motion the judge may make such order thereon as to him shall seem fit, or may remit the matter to the registrar for further inquiry or report.

131. If no notice of motion to vary the report is filed within *two weeks* from filing the registrar's report, the report shall stand confirmed.

COSTS.

132. In general costs shall follow the result; but the judge may in any case make such order as to the costs as to him shall seem fit (1).

133. The judge may direct payment of a lump sum in lieu of taxed costs.

134. If any plaintiff (other than a seaman suing for his wages or for the loss of his clothes and effects in a collision), or any defendant making a counter-claim, is not resident in the district in which the action is instituted, the judge may, on the application of the adverse party, order him to give bail for costs (2).

135. A party claiming an excessive amount, either by way of claim, or of set-off or counter claim, may be condemned in all costs and damages thereby occasioned (3).

136. If a tender is rejected, but is afterwards accepted, or is held by the judge to be sufficient, the party rejecting the

(1) *The Biddick*, 38 L. J. Ad. 24.

(3) *The Ruby*, 15 P. D. 139.

(2) See *ante*, p. 128. *The Rouge-ment* (1893), P. 275.

tender shall, unless the judge shall otherwise order, be condemned in the costs incurred after tender made (1).

137. A party, who has not admitted any fact which in the opinion of the judge he ought to have admitted, may be condemned in all costs occasioned by the non-admission.

138. Any party pleading at unnecessary length, or taking any unnecessary proceeding in an action may be condemned in all costs thereby occasioned.

TAXATION OF COSTS.

139. A party desiring to have a bill of costs taxed shall file the bill, and shall procure an appointment from the registrar for the taxation thereof, and shall serve the opposite party with notice of the time at which such taxation will take place.

140. At the time appointed, if either party is present, the taxation shall be proceeded with.

141. Within *one week* from the completion of the taxation application may be made, by either party, to the judge to review the taxation.

142. Costs may be taxed either by the judge or by the registrar, and as well between solicitor and client as between party and party.

143. If in a taxation between solicitor and client more than *one-sixth* of the bill is struck off, the solicitor shall pay all the costs attending the taxation.

144. The fees to be taken by any district registrar shall, if either party desires it, be taxed by the judge.

APPRAISEMENT AND SALE, ETC.

145. The judge may, either before or after final judgment, order any property under the arrest of the Court to be appraised, or to be sold with or without appraisement, and either by public auction or by private contract, and may direct what notice, by advertisement or otherwise, shall be given or may dispense with the same (2).

(1) See R. 85. *The William Symington*, 10 P. D. 1.

(2) The cargo *ex Venus*, L. R. 1 A. & E. 50.

The Paul, L. R. 1 A. & E. 57.

146. If the property is deteriorating in value, the judge may order it to be sold forthwith.

147. If the property to be sold is of small value, the judge may, if he thinks fit, order it to be sold without a commission of sale being issued.

148. The judge may, either before or after final judgment, order any property under arrest of the Court to be removed, or any cargo under arrest on board ship to be discharged.

149. The appraisement, sale, and removal of property, the discharge of cargo, and the demolition and sale of a vessel condemned under any Slave Trade Act, shall be effected under the authority of a commission addressed to the marshal. Forms of commissions of appraisement, sale, appraisement and sale, removal, discharge of cargo, and demolition and sale, will be found in the Appendix hereto, Nos. 44 to 49.

150. The commission shall, as soon as possible after its execution, be filed by the marshal, with a return setting forth the manner in which it has been executed.

151. As soon as possible after the execution of a commission of sale, the marshal shall pay into Court the gross proceeds of the sale, and shall with the commission file his accounts and vouchers in support thereof.

152. The registrar shall tax the marshal's account, and shall report the amount at which he considers it should be allowed; and any party who is interested in the proceeds may be heard before the registrar on the taxation.

153. Application may be made to the judge on motion to review the registrar's taxation.

154. The judge may, if he thinks fit, order any property under the arrest of the Court to be inspected. A form of order for inspection will be found in the Appendix hereto, No. 50.

DISCONTINUANCE.

155. The plaintiff may at any time, discontinue his action by filing a notice to that effect, and the defendant shall

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thereupon be entitled to have judgment entered for his costs of action on filing a notice to enter the same. The discontinuance of an action by the plaintiff shall not prejudice any action consolidated therewith or any counter-claim previously set up by the defendant. Forms of notice of discontinuance and of notice to enter judgment for costs will be found in the Appendix hereto, Nos. 51 and 52 (1).

CONSENTS.

156. Any consent in writing signed by the parties may, by permission of the registrar, be filed, and shall thereupon become an order of court.

CERTIFICATE OF STATE OF ACTION.

157. Upon the application of any person the registrar shall, upon payment of the usual fee, certify as shortly as he conveniently can, the several proceedings had in his office in any action or matter, and the dates thereof.

APPEAL FROM THE JUDGMENT OR ORDER OF A LOCAL JUDGE
IN ADMIRALTY TO THE EXCHEQUER COURT.

158. Any person who desires to appeal to the Exchequer Court, from any judgment or order of a local judge in Admiralty of the said Court, shall give security in the sum of two hundred dollars if such judgment or order is final, or if interlocutory, in the sum of one hundred dollars, to the satisfaction of such local judge, or of the judge of the Exchequer Court, that he will effectually prosecute his appeal and pay such costs as may be awarded against him by the Exchequer Court. If the appeal is by or on behalf of the Crown, no security shall be necessary (2).

159. All appeals to the Exchequer Court from any judgment or order of any local judge in Admiralty of the Court shall be by way of rehearing, and shall be brought by notice of motion in a summary way, and no petition, case or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the

(1) *The J. H. Henkes*, 12 P. D. 106.
The Hope, 8 P. D. 144.

(2) *The Duke of Buccleuch* (1892),
P. 201.

notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part. A form of notice of motion on appeal will be found in the Appendix hereto, No. 53.

160. The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Exchequer Court may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may be just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties. Any notice of appeal may be amended at any time as the Exchequer Court may think fit.

161. Notice of appeal from any judgment, whether final or interlocutory, or from a final order, shall be a *twenty days'* notice, and notice of appeal from any interlocutory order shall be a *ten days'* notice.

162. The Exchequer Court shall in any appeal have all its powers and duties as to amendment and otherwise, together with full discretionary power to receive further evidence upon questions of fact,—such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after the trial or hearing of any cause or matter upon their merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court. The Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to

make such further or other order as the case may require. The powers aforesaid may be exercised by the said Court, notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such power may also be exercised in favor of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. The Court shall have power to make such order as to the whole or any part of the costs of the appeal as may be just.

163. If, upon the hearing of any appeal, it shall appear to the Exchequer Court, that a new trial ought to be had, it shall be lawful for the said Court, if it shall think fit, to order that the verdict and judgment shall be set aside, and that a new trial shall be had.

164. It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross-appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the local judge in Admiralty should be varied, he shall within the time specified in the next rule, or such time as may be prescribed by special order, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not in any way interfere with the power of the Court on the hearing of the appeal to treat the whole case as open, but may, in the discretion of the Court, be ground for an adjournment of the appeal, or for a special order as to costs.

165. Subject to any special order which may be made, notice by a respondent under the last preceding rule shall, in the case of any appeal from a final judgment, be a *fourteen days'* notice, and, in the case of an appeal from an interlocutory order, a *seven days'* notice.

166. The party appealing from a judgment or order shall produce to the registrar of the Exchequer Court the judgment or order or an office copy thereof, and shall leave with him a copy of the notice of appeal to be filed, and such officer shall thereupon set down the appeal by entering the same in the proper list of appeals, and it shall come on to

be heard according to its order in such list unless the judge of the Exchequer Court shall otherwise direct, but so as not to come into the paper for hearing before the day named in the notice of appeal.

167. Where an *ex parte* application has been refused by the local judge in Admiralty, an application for a similar purpose may be made to the Exchequer Court *ex parte* within *ten days* from the date of such refusal, or within such enlarged time as the judge of the Exchequer Court may allow.

168. When any question of fact is involved in an appeal, the evidence taken before the local judge in Admiralty bearing on such question shall, subject to any special order, be brought before the Exchequer Court as follows:—

- (a) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed.
- (b) As to any evidence given orally, by the production of a copy of the judge's notes, or such other materials as the Court may deem expedient.

169. Where evidence has not been printed in the proceedings before the local judge in Admiralty, the local judge in Admiralty, or the judge of the Exchequer Court, may order the whole or any part thereof to be printed for the purpose of the appeal. Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the judge of the Exchequer Court shall otherwise order.

170. If, upon the hearing of an appeal, a question arise as to the ruling or direction of the local judge, the Exchequer Court shall have regard to verified notes or other evidence, and to such other materials as the Court may deem expedient.

171. Upon any appeal to the Exchequer Court no interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Exchequer Court from giving such decision upon the appeal as may be just.

172. No appeal to the Exchequer Court from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Exchequer Court, be brought after the expiration of *thirty days*, and no other appeal shall, except by such leave, be brought after the expiration of *sixty days*. The said respective periods shall be calculated, in the case of an appeal from an order in chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases, from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal.

173. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the local judge in Admiralty, or the Exchequer Court may order; and no intermediate act or proceeding shall be invalidated, except so far as the judge of the Exchequer Court may direct.

174. Wherever under Rules 158 to 176, an application may be made either to the local judge in Admiralty or to the Exchequer Court; or the judge thereof, it shall be made in the first instance to the local judge in Admiralty.

175. Every application in respect to any appeal to the Exchequer Court or the judge thereof shall be by motion.

176. On appeal from a local judge in Admiralty, interest for such time as execution has been delayed by the appeal shall be allowed unless the local judge otherwise orders, and the taxing officer may compute such interest without any order for that purpose (1).

PAYMENTS INTO COURT.

177. All moneys to be paid into Court shall be paid, upon receivable orders to be obtained in the registry, to the account of the registrar at some bank in the Dominion of Canada to be approved by the judge, or, with the sanction

(1) As to appeals to Privy Council see *ante*, p. 65.

of the Treasury Board, into the Treasury of the Dominion. A form of receivable order will be found in the Appendix hereto, No. 54 (1).

178. A bank or Treasury receipt for the amount shall be filed, and thereupon the payment into Court shall be deemed to be complete.

PAYMENTS OUT OF COURT.

179. No money shall be paid out of Court except upon an order signed by the judge. On signing a receipt to be prepared in the registry, the party to whom the money is payable under the order will receive a cheque for the amount signed by the registrar, upon the bank in which the money has been lodged, or an order upon the Treasurer in such form as the Treasury Board shall direct. A form of order for payment out of Court will be found in the Appendix hereto, No. 55 (2).

CAVEATS.

180. Any person desiring to prevent the arrest of any property may file a notice, undertaking, within *three days* after being required to do so, to give bail to any action or counter-claim that may have been, or may be, brought against the property, and thereupon the registrar shall enter a caveat in the caveat warrant book hereinafter mentioned. Forms of notice and of caveat warrant will be found in the Appendix hereto, Nos. 56 and 57.

181. Any person desiring to prevent the release of any property under arrest, shall file a notice, and thereupon the registrar shall enter a caveat in the caveat release book hereinafter mentioned. Forms of notice and of caveat release will be found in the Appendix hereto, Nos. 58 and 59.

182. Any person desiring to prevent the payment of money out of Court shall file a notice, and thereupon the registrar shall enter a caveat in the caveat payment book hereinafter mentioned. Forms of notice and of caveat payment will be found in the Appendix hereto, Nos. 60 and 61.

(1) Wms. & Br. (ed. 1886), p. 292.
The Edmond, Lush. 211.

(2) *The Annie Childs*, Lush. 509.
The North American, *ibid* 79.
Wms. & Br. (ed. 1886), p. 292.

183. If the person entering a caveat is not a party to the action, the notice shall state his name and address, and an address within three miles of the registry at which it shall be sufficient to leave all documents required to be served upon him.

184. The entry of a caveat warrant shall not prevent the issue of a warrant, but a party at whose instance a warrant shall be issued for the arrest of any property in respect of which there is a caveat warrant outstanding, shall be condemned in all costs and damages occasioned thereby, unless he shall show to the satisfaction of the judge good and sufficient reason to the contrary.

185. The party at whose instance a caveat release or caveat payment is entered, shall be condemned in all costs and damages occasioned thereby, unless he shall show to the satisfaction of the judge good and sufficient reason to the contrary.

186. A caveat shall not remain in force for more than *six months* from the date of entering the same.

187. A caveat may at any time be withdrawn by the person at whose instance it has been entered, on his filing a notice withdrawing it. A form of notice of withdrawal will be found in the Appendix hereto, No. 62.

188. The judge may overrule any caveat.

SUBPŒNAS.

189. Any party desiring to compel the attendance of a witness shall serve him with a subpœna, which shall be prepared by the party and issued under the seal of the Court. Forms of subpœnas will be found in the Appendix hereto, Nos. 63 and 64.

190. A subpœna may contain the names of any number of witnesses, or may be issued with the names of the witnesses in blank.

191. Service of the subpœna must be personal, and may be made by the party or his agent, and shall be proved by affidavit.

ORDERS FOR PAYMENT.

192. On application by a party to whom any sum has been found due, the judge may order payment to be made out of any money in Court applicable for the purpose.

If there is no such money in Court, or if it is insufficient, the judge may order that the party liable shall pay the sum found due, or the balance thereof, as the case may be, within such time as to the judge shall seem fit. The party to whom the sum is due may then obtain from the registry and serve upon the party liable an order for payment under seal of the Court. A form of order for payment will be found in the Appendix hereto, No. 65.

ATTACHMENTS.

193. If any person disobeys an order of the Court, or commits a contempt of Court, the judge may order him to be attached. A form of attachment will be found in the Appendix hereto, No. 66 (1).

194. The person attached shall, without delay be brought before the judge, and if he persists in his disobedience or contempt, the judge may order him to be committed. Forms of order for committal and of committal will be found in the Appendix hereto, Nos. 67 and 68.

The order for committal shall be executed by the marshal.

EXECUTION.

195. Any decree or order of the Court, made in the exercise of its Admiralty jurisdiction, may be enforced in the same manner as a decree or order made in the exercise of the ordinary civil jurisdiction of the Court may be enforced.

SEALS.

196. The seals to be used in the registry and district registries shall be such as the judge of the Exchequer Court may from time to time direct.

(1) See *Wms. & Br.* (ed. 1886), p. 498.

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INSTRUMENTS, ETC.

197. Every warrant, release, commission, attachment, and other instrument to be executed by any officer of, or commissioner acting under authority of, the Court, shall be prepared in the registry and signed by the registrar, and shall be issued under the seal of the Court.

198. Every document issued under the seal of the Court shall bear date on the day of sealing and shall be deemed to be issued at the time of the sealing thereof.

199. Every document requiring to be served shall be served within *twelve months* from the date thereof, otherwise the service shall not be valid.

200 Every instrument to be executed by the marshal shall be left with the marshal by the party at whose instance it is issued, with written instructions for the execution thereof.

NOTICES FROM THE REGISTRY.

201. Any notice from the registry may be either left at, or sent by post, by registered letter, to the address for service of the party to whom notice is to be given; and the day next after the day on which the notice is so posted shall be considered as the day of service thereof, and the posting thereof as aforesaid shall be a sufficient service.

FILING.

202. Documents shall be filed by leaving the same in the registry, with a minute stating the nature of the document and the date of filing it. A form of minute on filing any document will be found in the Appendix hereto, No. 69.

203. Any number of documents in the same action may be filed with one and the same minute.

TIME

204. If the time for doing any act or taking any proceeding in an action expires on a Sunday, or on any other day on which the registry is closed, and by reason thereof such act or proceeding can not be done or taken on that day, it may be done or taken on the next day on which the registry is open.

205. Where, by these rules or by any order made under them, any act or proceeding is ordered or allowed to be done within or after the expiration of a time limited from or after any date or event, such time, if not limited by hours, shall not include the day of such date or of the happening of such event, but shall commence on the next following day.

206. The judge may, on the application of either party, enlarge or abridge the time prescribed by these rules or forms or by any order made under them for doing any act or taking any proceeding, upon such terms as to him shall seem fit, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time prescribed.

SITTINGS OF THE COURT.

207. The judge shall appoint proper and convenient times for sittings in court and in chambers, and may adjourn the proceedings from time to time and from place to place as to him shall seem fit.

REGISTRY AND REGISTRAR.

208. The registry shall be open to suitors during fixed hours to be appointed by the judge.

209. The registrar shall obey all the lawful directions of the judge. He shall in person, or by a deputy approved of by the judge, attend all sittings whether in court or in chambers, and shall take minutes of all the proceedings. He shall have the custody of all records of the Court. He shall not act as counsel or solicitor in the Court.

MARSHAL.

210. The marshal shall execute by himself or his officer all instruments issued from the Court which are addressed to him, and shall make returns thereof (1).

211. Whenever, by reason of distance or other sufficient cause, the marshal cannot conveniently execute any instru-

(1) *The Petrel*, 3 Hag. 299

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ment in person, he shall employ some competent person as his officer to execute the same.

HOLIDAYS.

212. The registry and the marshal's office shall be closed on Sundays, Good Friday, Easter Monday, Easter Tuesday, and Christmas Day, and on such days as are appointed by law or by proclamation to be kept as holidays or fast days (1).

RECORDS OF THE COURT.

213. There shall be kept in the registry a book, to be called the minute book, in which the registrar shall enter in order of date, under the head of each action, and on a page numbered with the number of the action, a record of the commencement of the action, of all appearances entered, all documents issued, or filed, all acts done, and all orders and decrees of the Court, whether made by the judge, or by the registrar, or by consent of the parties in the action. Forms of minute of order of court, of minute on examination of witnesses, of minute of decree, and of minutes in an action for damage by collision, will be found in the Appendix hereto, Nos. 70 to 73.

214. There shall be kept in the registry a caveat warrant book, a caveat release book, and a caveat payment book, in which all such caveats, respectively, and the withdrawal thereof, shall be entered by the registrar.

215 Any solicitor may inspect the minute and caveat books.

216. The parties to an action may, while the action is pending, and for *one year* after its termination, inspect, free of charge, all the records in the action.

217. Except as provided by the two last preceding rules, no person shall be entitled to inspect the records in a pending action without the permission of the registrar.

218. In an action which is terminated, any person may on payment of a search fee, inspect the records in the action.

(1) See Rule 42.

COPIES.

219. Any person entitled to inspect any document in an action shall, on payment of the proper charges for the same, be entitled to an office copy thereof under seal of the Court.

FORMS.

220. The forms in the Appendix to these rules shall be followed with such variations as the circumstances may require, and any party using any other forms shall be liable for any costs occasioned thereby (1).

FEES.

221. Subject to the following rules, the fees set forth in the tables of fees in the Appendix hereto shall be allowed on taxation.

222. In any proceeding instituted in the registry at Ottawa the fees to be taken by the registrar shall be paid in stamps, and the proceeds of the sale of such stamps shall be paid into the Consolidated Revenue Fund of Canada.

223. Where the fee is per folio, the folio shall be counted at the rate of 100 words, and every numeral, whether contained in columns or otherwise written, shall be counted and charged for as a word.

224. Where the sum in dispute does not exceed \$200, or the value of the *res* does not exceed \$400, one-half only of the fees (other than disbursements) set forth in the table hereto annexed shall be charged and allowed.

225. Where costs are awarded to a plaintiff, the expression "sum in dispute" shall mean the sum recovered by him in addition to the sum, if any, counter-claimed from him by the defendant; and where costs are awarded to a defendant, it shall mean the sum claimed from him in addition to the sum, if any, recovered by him.

226. The judge may, in any action, order that half fees only shall be allowed.

(1) *The Isis*, 8 P. D. 227.

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227. If the same practitioner acts as both counsel and solicitor in an action, he shall not for any proceeding be allowed to receive fees in both capacities, nor to receive a fee as counsel where the act of a solicitor only is necessary.

CASES NOT PROVIDED FOR.

228. In all cases not provided for by these rules, the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed.

COMMENCEMENT OF RULES.

229. These rules shall come into force on the day on which notice of the approval thereof by His Excellency the Governor-General in Council, and by Her Majesty in Council shall be published in the *Canada Gazette*, and shall apply to all actions then pending in the Exchequer Court of Canada on its Admiralty side, as well as to actions commenced on and after such day.

REPEALING CLAUSE.

230. From and after the day on which the notice of the approval of these rules by His Excellency the Governor-General in Council, and by Her Majesty in Council, is published in the *Canada Gazette*, the following rules and regulations, together with all forms thereto annexed, and the table of fees now in force in the Exchequer Court in Admiralty proceedings, shall, in respect to any such proceeding in such Court, be repealed :

(a) The rules and tables of fees for the Vice-Admiralty Courts established by an Order of Her Majesty in Council of the 23rd day of August, 1883; and

(b) The rules and regulations and the table of fees previously in force in the Maritime Court of Ontario, and made by the judge of such Court on the 31st day of January, 1889, and approved by His Excellency the Governor-General in Council on the 14th day of February, 1889, and all rules of the said Maritime Court of Ontario.

Dated, at Ottawa, this 5th day of December, A. D. 1892.

GEO. W. BURBIDGE,
J. E. C.

APPENDIX.

I. FORMS.

No. 1.

TITLE OF COURT.

IN THE EXCHEQUER COURT OF CANADA.

Rule 4.

IN ADMIRALTY.

or (if instituted in a District Registry)

IN THE EXCHEQUER COURT OF CANADA.

THE QUEBEC *(or as the case may be)* ADMIRALTY DISTRICT.

No 2.

TITLE OF ACTION IN REM.

Rule 4.

[*Title of Court.*]

No.____ [*here insert the number of the action.*]

A. B., Plaintiff,
against

- (a) The Ship_____
- or* (b) The Ship_____ and freight.
- or* (c) The Ship_____ her cargo and freight.
or (if the action is against cargo only),
- (d) The cargo *ex* the Ship [*state name of ship on board of which the cargo now is or lately was laden.*]
or (if the action is against the proceeds realized by the sale of the ship or cargo),
- (e) The proceeds of the Ship_____
- or* (f) The proceeds of the cargo *ex* the Ship_____
or as the case may be.

Action for [*state nature of action, whether for damage by collision, wages, bottomry, etc., as the case may be.*]

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No. 3.

Rule 4.

TITLE OF ACTION IN PERSONAM.

[*Title of Court.*]No. _____ [*here insert the number of the action.*]

A. B., Plaintiff

against

The Owners of the Ship _____, [*or as the case may be.*]Action for [*state nature of action as in preceding form.*]

No. 4.

Rule 4.

TITLE OF ACTION IN THE NAME OF THE CROWN.

[*Title of Court.*]No. _____ [*insert number of action.*]

Our Sovereign Lady the Queen.

[*add, where necessary, in Her Office of Admiralty.*]

against

(a) The Ship _____, [*or as the case may be.*],

or,

(b) A. B., etc. [*the person or persons proceeded against.*]Action for [*state nature of action.*]

No. 5.

Rule 5.

WRIT OF SUMMONS IN REM.

(L. S.) [*Title of Court and Action.*]

VICTORIA, by the grace of God, of the United Kingdom
of Great Britain and Ireland, Queen, Defender of the
Faith, Empress of India.

To the owners and all others interested in the Ship _____
[*her cargo and freight, etc., or as the case may be.*]

WE command you that, within *one week* after the service
of this writ, exclusive of the day of such service, you do
cause an appearance to be entered for you in our Exchequer

Court of Canada in the above-named action ; and take notice that in default of your so doing the said action may proceed, and judgment may be given, in your absence.

Given at Ottawa [*or as the case may be*] in our said Court, under the seal thereof, this _____ day of _____ 18____

Memorandum to be subscribed on the Writ.

This writ may be served within *twelve months* from the date thereof, exclusive of the day of such date, but not afterwards.

The defendant [*or defendants*] may appear hereto by entering an appearance [*or appearances*] either personally or by solicitor at the registry of the said Court situate at Ottawa [*or as the case may be*].

No. 6.

WRIT OF SUMMONS IN PERSONAM.

Rule 5.

[*Title of Court and Action.*]

(L. S.) VICTORIA, by the grace of God, etc.

To C. D., of _____, and E. F., of _____

We command you that, within *one week* after the service of this writ, exclusive of the day of such service, you do cause an appearance to be entered for you in our Exchequer Court of Canada, in the above-named action ; and take notice that in default of your so doing the said action may proceed, and judgment may be given, in your absence.

Given at Ottawa [*or as the case may be*] in our said Court, under the seal thereof, this _____ day of _____ 18____

Memorandum to be subscribed on the Writ.

This writ may be served within *twelve months* from the date thereof, exclusive of the day of such date, but not afterwards.

The defendant [*or defendants*] may appear hereto by entering an appearance [*or appearances*] either personally or by solicitor at the registry of the said Court situate at Ottawa [*or as the case may be*].

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No. 7.

Rules 5-20-23. WRIT OF SUMMONS IN PERSONAM FOR SERVICE OUT OF JURISDICTION.

(L.S.) [Title of Court and Action.]

VICTORIA, by the grace of God, etc.

To C. D., of _____ E. F., of _____.

We command you that within (*here insert the number of days directed by the judge ordering the service or notice*) after the service of this writ (*or notice of this writ, as the case may be*), on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Exchequer Court of Canada in the above named action, and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

Given at Ottawa (*or as the case may be*) in our said Court, under the seal thereof, this _____ day of _____ 18____

Memorandum to be subscribed on Writ as in Form No. 6.

Indorsement to be made on the Writ before the issue thereof:

N. B.—This writ is to be used where the defendant or all the defendants, or one or more defendant or defendants, is or are out of the jurisdiction. When the defendant to be served is not a British subject, and is not in British dominions, notice of the writ, and not the writ itself, is to be served upon him.

No. 8.

Rules 23-24. NOTICE IN LIEU OF WRIT FOR SERVICE OUT OF JURISDICTION.

[Title of Court and Action.]

To C. D., of _____

Take notice that A. B., of _____, has commenced an action against you, C. D., in the Exchequer Court of Canada at Ottawa (or in the _____ Admiralty District, *as the case may be*), by writ of that Court, dated the _____ day of _____, A. D. 18____; which writ is indorsed

as follows: (*copy in full the indorsements*), and you are required within _____ days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said Court to the said action, and in default of your so doing the said A. B. may proceed therein, and judgment may be given in your absence.

You may appear to the said writ by entering an appearance personally or by your solicitor at the office of the registrar of the said Court at Ottawa (or at _____ in the _____ Admiralty District *as the case may be*).

(Signed) A. B., of _____ etc.

Or X. Y., of _____

Solicitor for A. B.

No. 9.

INDORSEMENTS TO BE MADE ON THE WRIT BEFORE ISSUE Rule 5. THEREOF.

(1) The plaintiff claims [*insert description of claim as given in Form No. 10*].

(2) This writ was issued by the plaintiff in person, who resides at [*state plaintiff's place of residence, with name of street and number of house, if any*].

or,

This writ was issued by C. D., of [*state place of business*] solicitor for the plaintiff.

(3) All documents required to be served upon the said plaintiff in the action may be left for him at [*insert address for service within three miles of the registry*].

or,

Where the action is in the name of the Crown:

(1) A. B. etc., claims [*insert description of claim as given in Form No. 10*].

(2) This writ was issued by A. B. [*state name and address of person prosecuting in the name of the Crown, or his solicitor, as the case may be*].

(3) All documents required to be served upon the Crown in this action may be left at [*insert address for service within three miles of the registry*].

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No. 10.

Rule 5.

INDORSEMENTS OF CLAIM.

(1) *Damage by collision :*

The plaintiffs as owners of the ship "Mary" [her cargo and freight, etc., *or as the case may be*] claim the sum of \$— against the ship "Jane" for damage occasioned by a collision which took place [*state where*] on the _____ day of _____, and for costs.

(2) *Salvage :*

The plaintiffs, as the owners, master, and crew of the ship "Mary," claim the sum of \$— for salvage services rendered by them to the ship "Jane" [her cargo and freight, etc., *or as the case may be*] on the _____ day of _____ 18 __, in or near [*state where the services were rendered*], and for costs.

(3) *Pilotage :*

The plaintiff claims the sum of \$— for pilotage of the ship "Jane," on the _____ day of _____ 18 __ from [*state where pilotage commenced*] to [*state where pilotage ended*], and for costs.

(4) *Towage :*

The plaintiffs, as owners of the ship "Mary," claim the sum of \$— for towage services rendered by the said ship to the ship "Jane" [her cargo and freight, etc., *or as the case may be*], on the _____ day of _____ 18 __, at or near [*state where the services were rendered*], and for costs.

(5) *Master's Wages and Disbursements :*

The plaintiff claims the sum of \$—, for his wages and disbursements as master of the ship "Mary," and to have an account taken thereof, and for costs.

(6) *Seamen's Wages :*

The plaintiffs, as seamen on board the ship "Mary," claim the sum of \$— for wages due to them, as follows, and for costs :

To A. B., the mate, \$—, for two months' wages from the _____ day of _____ .

To C. D., able seaman, \$—, etc., etc.

[And the plaintiffs claim to have an account taken thereof.]

(7) *Necessaries, Repairs, etc. :*

The plaintiffs claim the sum of \$ _____ for necessaries supplied [or repairs done, etc., *as the case may be*] to the ship "Mary," at the port of _____ on the _____ day of _____, and for costs [and the plaintiffs claim to have an account taken thereof].

(8) *Possession :*

(a) The plaintiff, as sole owner of the ship "Mary," of the port of _____, claims possession of the said ship.

(b) The plaintiff, as owner of 48-64th shares of the ship "Mary," of the port of _____ claims possession of the said ship against *C. D.*, owner of 16-64th shares of the same ship.

(9) *Mortgage :*

The plaintiff, under a mortgage dated the _____ day of _____, claims against the ship "Mary," [or the proceeds of the ship "Mary," *or as the case may be*], the sum of \$ _____, as the amount due to him for principal and interest, and for costs.

(10) *Claims between Co-Owners :*

(a) The plaintiff, as part owner of the ship "Mary," claims against *C. D.*, part owner of the same ship, the sum of \$ _____, as part of the earnings of the said ship due to the plaintiff, and for costs; and to have an account taken thereof.

(b) The plaintiff, as owner of 24-64th shares of the ship "Mary," being dissatisfied with the management of the said ship by his co-owners, claims that his co-owners shall give bail in the sum of \$ _____, the value of his said shares, for the safe return of the ship to the Dominion of Canada [or to the district, *as the case may be*].

(11) *Bottomry :*

The plaintiff, as assignee of a bottomry bond, dated the _____ day of _____, and granted by *C. D.*, as master of the ship "Mary," of _____ to *A. B.* at the port of _____ claims the sum of \$ _____ against the ship "Mary" [her cargo and freight, etc., *or as the case may be*] as the amount due to him under the said bond, and for costs.

(12) *Derelict:*

A. B. claims to have the derelict ship "Mary" [or cargo, etc., or as the case may be] condemned as forfeited to Her Majesty in her office of Admiralty.

(13) *Piracy:*

A. B., commander of H. M. S. "Torch," claims to have the Chinese junk "Tecumseh" and her cargo condemned as forfeited to Her Majesty as having been captured from pirates.

(14) *Slave Trade:*

A. B., commander of H. M. S. "London," claims to have the vessel, name unknown [together with her cargo and twelve slaves] seized by him on the _____ day of _____ 18____ condemned as forfeited to Her Majesty, on the ground that the said vessel was at the time of her seizure engaged in or fitted out for the slave trade, in violation of existing treaties between Great Britain and Zanzibar [or of the Act 5 Geo. IV. c. 113, or as the case may be].

or

C. D., the owner of the _____ vessel _____ [and cargo, or as the case may be] captured by H. M. S. "London" on the _____ day of _____ 18____, claims to have the said vessel [and cargo, or as the case may be] restored to him [together with costs and damages for the seizure thereof].

(15) *Under Pacific Islanders Protection Acts:*

A. B., as commander of H. M. S. "Lynx," claims to have the British ship "Mary" and her cargo condemned as forfeited to Her Majesty, for violation of the Pacific Islanders Protection Acts, 1872 and 1875.

(16) *Under Foreign Enlistment Act:*

A. B. claims to have the British ship "Mary," together with the arms and munitions of war on board thereof, condemned as forfeited to Her Majesty for violation of the Foreign Enlistment Act, 1870.

(17) *Under Customs Acts:*

A. B. claims to have the ship "Mary" [or as the case may be] condemned as forfeited to Her Majesty for violation of [state Act under which forfeiture is claimed].

(18) *Recovery of pecuniary forfeiture or penalty:*

A. B. claims judgment against the defendant for penalties for violation of [*state Act under which penalties are claimed*].

No. 11.

AFFIDAVIT OF SERVICE OF A WRIT OF SUMMONS.

Rule 18.

[*Title of Court and Action.*]

County of _____ }

I, A. B., of _____ in the County of _____
[*calling or occupation*] make oath and say:

1. That I did on the _____ day of _____ 18____
serve the writ of summons herein by [*here state the mode in
which the service was effected, whether on the owner, or on the ship,
cargo or freight, etc., as the case may be*] on _____ the
_____ day of _____ 18____

(Signed)

A. B.

SWORN before me, etc.

A Commissioner, etc.

No. 12.

APPEARANCE.

Rule 23.

(1) *By defendant in person.*

[*Title of Court and Action.*]

Take notice that I appear in this action.

Dated this _____ day of _____ 18____

(Signed) C. D., Defendant.

My address is _____

My address for service is _____

(2) *By Solicitor for Defendant.*

[*Title of Court and Action.*]

Take notice that I appear for C. D. of [*insert address of
C. D.*] in this action.

Dated this _____ day of _____ 18____

(Signed) X. Y.,

Solicitor for C. D.

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My place of business is _____
 My address for service is _____

No. 13.

Rule 28.

INDORSEMENT OF SET-OFF OR COUNTER-CLAIM.

The defendant [*or, if he be one of several defendants, the defendant C.D.*] owner of the ship "Mary" [*or as the case may be*] claims from the plaintiff [*or claims to set-off against the plaintiff's claim*] the sum of _____ for [*state the nature of the set-off or counter-claim and the relief or remedy required as in Form No. 10, mutatis mutandis*], and for costs.

No. 14.

Rule 35.

AFFIDAVIT TO LEAD WARRANT.

[*Title of Court and Action.*]

I, A. B. [*state name and address*] make oath and say that I have a claim against the ship "Mary" for [*state nature of claim.*]

And I further make oath and say that the said claim has not been satisfied, and that the aid of this Court is required to enforce it.

On the _____ day of _____ 18____, }
 the said A. B. was duly sworn to } (Signed) A. B.
 the truth of this affidavit at _____ }

Before me,

E. F., *fc.*

or

Where the Action is in the name of the Crown,

I, A. B., &c. [*state name and address of person suing in the name of the Crown*] make oath and say that I claim to have the ship "Mary" and her cargo [*or the vessel, name unknown, or the cargo ex the ship "Mary," etc., or as the case may be*] condemned to her Majesty;—

(a) as having been fitted out for or engaged in the Slave Trade in violation of [*state Act or Treaty alleged to have been violated*];

or (b) as having been captured from pirates;

or (c) as having been found derelict;

or (d) for violation of [*state Act alleged to have been violated, or as the case may be*].

I further make oath and say that the aid of this Court is required to enforce the said claim.

On the ____ day of _____ 18____, }
the said *A. B.* was duly sworn to the } (Signed) *A. B.*
truth of this affidavit at ____.

Before me,

E. F. etc.

No. 15.

WARRANT.

Rule 40.

[*Title of Court and Action.*]

(L.S.)

VICTORIA, ETC.

To the Marshal of the Admiralty District of _____
[or Sheriff of the County of _____ *or as the case may be*].

We hereby command you to arrest the ship _____
her cargo and freight, etc., *or as the case may be*, and to keep
the same under safe arrest, until you shall receive further
orders from us.

Given at _____ in our said Court, under the seal
thereof, this _____ day of _____ 18____

Warrant

Taken out by _____

(Signed) *E. F.,*

Registrar (*or District Registrar, as the case may be*).

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No. 16.

Rule 44.

CERTIFICATE OF SERVICE TO BE INDORSED ON THE WARRANT
AFTER SERVICE THEREOF.

This warrant was served by [*state by whom and in what mode service was effected*] on _____ the _____ day of _____ 18 ____

(Signed) G. H.

Marshal of the Admiralty District of _____ [or
Sheriff of the County of _____, or as the case
may be].

No. 17.

Rule 46.

BAILBOND.

[Title of Court and Action.]

Know all men by these presents that we [*insert names, addresses, and descriptions of the sureties in full*] hereby jointly and severally submit ourselves to the jurisdiction of the said Court, and consent that if the said [*insert name of party for whom bail is to be given, and state whether plaintiff or defendant*], shall not pay what may be adjudged against him in the above named action, with costs [*or, for costs, if bail is to be given only for costs*], execution may issue against us, our heirs, executors and administrators, goods and chattels, for a sum not exceeding [*state sum in letters*] dollars.

This Bailbond was signed by
the said _____
and _____
the sureties, the _____ day of _____
_____ 18 ____, in the registry
of the Exchequer Court of Canada
[or as the case may be].

Signatures of Sureties.

Before, me,

E. F.,

Registrar, or District Registrar,

[or clerk in the registry, or Commissioner to take bail, or as the case may be].

No. 18.

COMMISSION TO TAKE BAIL.

Rule 46.

[*Title of Court and Action.*]

[L.S.]

VICTORIA, &C.

To [*state name and description of Commissioner*], Greeting.

Whereas in the above-named action bail is required to be taken on behalf of [*state name of party for whom bail is to be given, and whether plaintiff or defendant*] in the sum of [*state sum in letters*] dollars, to answer judgment in the said action.

We therefore, hereby authorise you to take such bail on behalf of the said _____ from two sufficient sureties, upon the bailbond hereto annexed, and to swear the said sureties to the truth of the annexed affidavits as to their sufficiency, in the form indorsed hereon.

And we command you, that upon the said bond and affidavits being duly executed and signed by the said sureties, you do transmit the same, attested by you, to the registry of our said Court.

Given at _____ in our said Court, under the seal thereof, this _____ day of _____ 18__

(Signed) *E. F.*,
Registrar [*or District Registrar*].

Commission to take bail.

Taken out by _____

Form of Oath to be Administered to each Surety.

You swear that the contents of the affidavit, to which you have subscribed your name, are true.

So help you God.

No. 19.

AFFIDAVIT OF JUSTIFICATION.

Rule 47.

[*Title of Court and Action.*]

I [*state name, address, and description of surety*], one of the proposed sureties for [*state name, address, and description of*

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person for whom bail is to be given], make oath and say that I am worth more than the sum of [*state in letters the sum in which bail is to be given*] dollars, after the payment of all my debts.

On the _____ day of _____
18____, the said _____
was duly sworn to the truth of this
affidavit at _____

Before me,

E. F., Registrar.

or District Registrar or Commissioner [*or
as the case may be*].

*Signature of
Surety.*

No. 20.

Rule 50.

NOTICE OF BAIL.

[*Title of Court and Action*].

Take notice, that I tender the under-mentioned persons as bail on behalf of [*state name, address, and description of party for whom bail is to be given, and whether plaintiff or defendant*] in the sum of [*state sum in letters and figures*] to answer judgment in this action [*or judgment and costs, or costs only, or as the case may be*].

Names, addresses, and descriptions of

SURETIES.

REFEREES.

| | |
|-----------|-------|
| (1) _____ | _____ |
| (2) _____ | _____ |

Dated this _____ day of _____ 18____

(Signed) *X. Y.*

No. 21.

Rule 51.

NOTICE OF OBJECTION TO BAIL.

[*Title of Court and Action*].

Take notice, that I object to the bail proposed to be given by [*state name, address, and description of surety or sureties objected to*] in the above named action.

Dated the _____ day of _____ 18____

(Signed) *A. B.*

No. 22.

RELEASE.

Rule 57.

(L.S.) [Title of Court and Action].

VICTORIA, etc.

To the Marshal of the Admiralty District of _____
(or the Sheriff of the County of _____, or as the case
may be). Greeting :

Whereas, by our warrant issued in the above-named action
on the _____ day of _____ 18____, we did com-
mand you to arrest [*state name and nature of property arrested*]
and to keep the same under safe arrest until you should
receive further orders from us. We do hereby command
you to release the said [*state name and nature of property to be
released*] from the said arrest upon payment being made to
you of all fees due to and charges incurred by you in respect
of the arrest and custody thereof.

Given at _____, in our said Court, under the seal
thereof, _____ day of _____ 18____

Release

Taken out by _____

(Signed) E. F.,
Registrar [or District Registrar].

No. 23.

PLEADINGS.

Rule 64.

(1) *In an Action for damage by collision :*

a. (*The "Atlantic."*)

STATEMENT OF CLAIM.

[Title of Court and Action.]

Writ issued _____ 18____.

1. Shortly before 7 p. m. on the 31st January, 1878, the
brig "Anthes," of 234 tons register, of which the plaintiff,
George De Garis, was then owner, whilst on a voyage from
Cardiff to Granville, in France, laden with coals, and manned
with a crew of nine hands, all told, was about fifteen miles
S. E. $\frac{1}{2}$ E. from the Lizard Light.

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2. The wind at that time was about E. N. E., a moderate breeze, the weather was fine, but slightly hazy, and the tide was about slack water, and of little force. The "Anthes" was sailing under all plain sail, close hauled on the port tack, heading about S. E. and proceeding through the water at the rate of about five knots per hour. Her proper regulation side sailing lights were duly placed and exhibited and burning brightly, and a good lookout was being kept on board of her.

3. At that time those on board the "Anthes" observed the red light of a sailing vessel, which proved to be the "Atlantic," at the distance of about from one mile and a half to two miles from the "Anthes," and bearing about one point on her port bow. The "Anthes" was kept close hauled by the wind on the port tack. The "Atlantic" exhibited her green light and shut in her red light, and drew a little on to the starboard bow of the "Anthes," and she was then seen to be approaching and causing immediate danger of collision. The helm of the "Anthes" was thereupon put hard down, but the "Atlantic," although loudly hailed from the "Anthes," ran against and with her stem and starboard bow struck the starboard quarter of the "Anthes" abaft the main rigging, and did her so much damage that the "Anthes," soon afterwards sank, and was with her cargo wholly lost, and four of her hands were drowned.

4. There was no proper lookout kept on board the "Atlantic."

5. Those on board the "Atlantic" improperly neglected to take in due time proper measures for avoiding a collision with the "Anthes."

6. The helm of the "Atlantic" was ported at an improper time.

7. The said collision, and the damages and losses consequent thereon, were occasioned by the negligent and improper navigation of those on board the "Atlantic."

The plaintiff claims —

1. A declaration that he is entitled to the damage proceeded for.

2. The condemnation of the defendants [and their bail] in such damage and in costs.
3. To have an account taken of such damage with the assistance of merchants.
4. Such further or other relief as the nature of the case may require.

Dated the _____ day of _____ 18 ____ .
 (Signed) A. B., Plaintiff.

DEFENCE AND COUNTER-CLAIM.

[*Title of Court and Action.*]

1. The defendants are the owners of the Swedish barque "Atlantic," of 988 tons register, carrying a crew of nineteen hands all told, and at the time of the circumstances herein-after stated bound on a voyage to Cardiff.

2. A little before 6.30 p. m., of the 31st January, 1878, the "Atlantic" was about fifteen miles S. E. by S. of the Lizard. The wind was E. N. E. The weather was hazy. The "Atlantic," under foresail, fore and main topsails, main top-gallant sail, and jib, was heading about W. S. W., making from five to six knots an hour with her regulation lights duly exhibited and burning, and a good lookout being kept on board her.

3. In these circumstances the red lights of two vessels were observed pretty close together, about half mile off, and from two to three points on the starboard bow. The helm of the "Atlantic" was put to port in order to pass on the port sides of these vessels. One, however, of the vessels, which was the "Anthes," altered her course, and exhibited her green light, and caused danger of collision. The helm of the "Atlantic" was then ordered to be steadied, but before this order could be completed was put a hard-a-port. The "Anthes" with her starboard side by the main rigging struck the stem of the "Atlantic" and shortly afterwards sank, her master and four of her crew being saved by the "Atlantic."

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4. Save as hereinbefore admitted, the several statements in the statement of claim are denied.

5. The "Anthes" was not kept on her course as required by law.

6. The helm of the "Anthes" was improperly starboarded.

7. The collision was caused by one or both of the things stated in the fifth and sixth paragraphs hereof, or otherwise by the negligence of the plaintiffs, or of those on board the "Anthes."

8. The collision was not caused or contributed to by the defendants, or by any of those on board the "Atlantic."

And by way of counter-claim, the defendants say

They have suffered great damage by reason of the collision.

And they claim as follows:

1. Judgment against the plaintiff (and his bail) for the damage occasioned to the defendants by the collision, and for the costs of this action.
2. To have an account taken of such damage with the assistance of merchants.
3. Such further and other relief as the nature of the case may require.

Dated the _____ day of _____ 18____

(Signed) *C. D., etc., Defendants.*

REPLY.

[*Title of Court and Action*].

The plaintiff denies the several statements contained in the statement of defence and counter-claim [*or admits the several statements contained in paragraphs _____ and _____ of the statement of defence and counter-claim, but denies the other statements contained therein*].

Dated the _____ day of _____ 18____

(Signed) *A. B., Plaintiff.*

b. (*The "Julia David."*)

STATEMENT OF CLAIM.

[*Title of Court and Action.*]

Writ issued _____ 18____

1. At about 2 a. m., on the 4th day of September, 1876, the steamship "Sarpedon," of 1,556 tons register, and 225 horse power, of which the plaintiffs were owners, whilst on a voyage from Shanghai and other ports to London, with a cargo of tea and other goods, was about eighty miles south-west of Ushant.

2. The wind at such time was about south-west, the weather was a little hazy, and occasionally slightly thick, and the "Sarpedon" was under steam and sail, steering north-east, and proceeding at the rate of about ten knots per hour. Her proper regulation masthead and side lights were duly exhibited and burning brightly, and a good lookout was being kept.

3. At such time the masthead and red lights of a steam vessel, which proved to be the above-named vessel "Julia David," were seen at the distance of about two miles from and ahead of the "Sarpedon," but a little on her port bow. The helm of the "Sarpedon" was ported and hard a-ported, but the "Julia David" opened her green light to the "Sarpedon," and although the engines of the "Sarpedon" were immediately stopped, and her steam whistle was blown, the "Julia David" with her stem struck the "Sarpedon" on her port side, abreast of her red light, and did her so much damage that her master and crew were compelled to abandon her, and she was lost with her cargo. The "Julia David" went away without rendering assistance to those on board the "Sarpedon," and without answering signals which were made by them for assistance.

4. Those on board the "Julia David" neglected to keep a proper lookout.

5. Those on board the "Julia David" neglected to duly port the helm of the "Julia David."

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6. The helm of the "Julia David" was improperly star-boarded.

7. The "Julia David" did not duly observe and comply with the provisions of Article 16 of the "Regulations for Preventing Collisions at Sea."

8. The said collision was occasioned by the improper and negligent navigation of the "Julia David."

The plaintiffs claim —

1. A declaration that they are entitled to the damage proceeded for, and the condemnation of the said steamship "Julia David," and the defendants therein, and in costs.
2. To have an account taken of such damage with the assistance of merchants.
3. Such further and other relief as the nature of the case may require.

Dated the _____ day of _____ 18__

(Signed) _____ A. B., etc., Plaintiffs.

DEFENCE AND COUNTER-CLAIM.

[*Title of Court and Action.*]

1. The defendants are the owners of the Belgian screw steamship "Julia David," of about 1,274 tons register, and worked by engines of 140 horse power nominal, with a crew of thirty hands, which left Havre on the 2nd of September, 1876, with a general cargo, bound to Alicante and other ports in the Mediterranean.

2. About 2.45 a. m. of the 4th September, 1876, the "Julia David," in the course of her said voyage, was in the Bay of Biscay. The weather was thick with a drizzling rain, and banks of fog and a stiff breeze blowing from S. S. W., with a good deal of sea. The "Julia David," under steam alone, was steering S. S. W. $\frac{1}{2}$ W. by bridge steering compass, or S. W. $\frac{1}{2}$ W. magnetic, and was making about five knots an hour. Her regulation lights were duly exhibited and burning brightly, and a good lookout was being kept on board her.

3. In the circumstances aforesaid those on board the "Julia David" saw the green and masthead lights of a steamship, the "Sarpedon," about two miles off, and about two points on the starboard bow. The "Julia David" was kept on her course. But after a short time the "Sarpedon" opened her red light and caused danger of collision. The helm of the "Julia David" was thereupon put hard a-port, and her engines stopped and almost immediately reversed full speed, but, nevertheless, the "Sarpedon" came into collision with the "Julia David," striking with the port side her stem and port bow, and doing her considerable damage.

4. The vessels separated immediately. The engines of the "Julia David" were then stopped, and her pumps sounded. She was making much water, and it was found necessary to turn her head away from the wind and sea. As soon as it could be done without great danger, she was steamed in the direction in which those on board her believed the "Sarpedon" to be, but when day broke and no traces of the "Sarpedon" could be discovered, the search was given up, and the "Julia David," being in a very disabled state, made her way to a port of refuge.

5. Save as hereinbefore appears, the several statements contained in the statement of claim are denied.

6. A good lookout was not kept on board the "Sarpedon."

7. The helm of the "Sarpedon" was improperly ported.

8. Those on board the "Sarpedon" improperly neglected or omitted to keep her on her course.

9. Those on board the "Sarpedon" did not observe the provisions of Article 16 of the "Regulations for Preventing Collisions at Sea."

10. The collision was occasioned by some or all of the matters and things alleged in the 6th, 7th, 8th and 9th paragraphs hereof, or otherwise by the default of the "Sarpedon," or those on board her.

11. No blame in respect of the collision is attributable to the "Julia David" or to any of those on board her.

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And by way of counter-claim the defendants say that the collision caused great damage to the "Julia David."

And they claim —

1. The condemnation of the plaintiffs [and their bail] in the damage caused to the "Julia David" and in the costs of this action.
2. To have an account taken of such damage with the assistance of merchants.
3. Such further and other relief as the nature of the case may require.

Dated the _____ day of _____ 18_____.

(Signed) C. D., etc., Defendants.

REPLY.

[*Title of Court and Action.*]

The plaintiffs deny the several statements contained in the statement of defence and counter-claim [*or, as the case may be.*]

Dated the _____ day of _____ 18_____.

(Signed) A. B. etc., Plaintiffs.

(2) *In an Action for Salvage:*

a. (*The "Crosby."*)

STATEMENT OF CLAIM.

[*Title of Court and Action.*]

Writ issued _____ 18_____.

1. The "Asia" is an iron screw steamship of 902 tons net register tonnage, fitted with engines of 120 horse power nominal, is of the value of \$_____, and was at the time of the services hereinafter stated manned with a crew of twenty-three hands under the command of George Hook Bawn, her master.

2. At about 9 a. m. on the 29th of April, 1877, while the "Asia"—which was in ballast proceeding on a voyage to

Nikolaev to load a cargo of grain — was between Odessa and Ochakov, those on board her saw a steamship ashore on a bank situated about ten miles to the westward of Ochakov. The "Asia" immediately steamed in the direction of the distressed vessel which made signals for assistance.

3. On nearing the distressed vessel, which proved to be the "Crosby," one of the "Asia's" boats was sent to the "Crosby," in charge of the second mate of the "Asia," and subsequently the master of the "Crosby" boarded the "Asia," and, at the request of the master of the "Crosby," the master of the "Asia" agreed to endeavor to tow the "Crosby" afloat.

4. The "Crosby" at this time was fast aground, and was lying with her head about N. N. W.

5. The master of the "Asia" having ascertained from the master of the "Crosby" the direction in which the "Crosby" had got upon the bank, the "Asia" steamed up on the starboard side of the "Crosby," and was lashed to her.

6. The "Asia" then set on ahead and attempted to tow the "Crosby" afloat, and so continued towing without effect until the hawser which belonged to the "Asia" broke.

7. The masters of the two vessels, being then both agreed in opinion that it would be necessary to lighten the "Crosby" before she could be got afloat, it was arranged that the cargo from the "Crosby" should be taken on board the "Asia."

8. The "Asia" was again secured alongside the "Crosby," and the hatches being taken off, cargo was then discharged from the "Crosby" into the "Asia," and this operation was continued until about 6 p. m., by which time about 100 tons of such cargo had been so discharged.

9. When this had been done both vessels used their steam, and the "Asia" tried again to get the "Crosby" off, but without success. The "Asia" then towed with a hawser ahead of the "Crosby," and succeeded in getting her afloat, upon which the "Crosby" steamed to an anchorage and then brought up.

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10. The "Asia" steamed after the "Crosby" and again hauled alongside of her and commenced putting the transhipped cargo again on board the "Crosby," and continued doing so until about 6 a. m. of the 30th of April, by which time the operation was completed, and the "Crosby" and her cargo being in safety, the "Asia" proceeded on her voyage.

11. By the services of the plaintiffs, the "Crosby" and her cargo were rescued from a very dangerous and critical position, as in the event of bad weather coming on whilst she lay aground, she would have been in very great danger of being lost with her cargo.

12. The "Asia" encountered some risk in being lashed alongside the "Crosby," and she ran risk of also getting aground and of losing her charter, the blockade of the port of Nikolaev being at the time imminent.

13. The value of the hawser of the "Asia" broken, as herein stated, was \$_____

14. The "Crosby" is an iron screw steamship of 1,118 tons net (1,498 gross) register tonnage. As salvaged, the "Crosby" and her cargo and freight have been agreed for the purposes of this action at the value of \$_____

The plaintiffs claim —

1. Such an amount of salvage, regard being had to the said agreement, as the Court may think fit to award.
2. The condemnation of the defendants (and their bail) in the salvage and in costs.
3. Such further and other relief as the case may require.

Dated the _____ day of _____ 18. _____

(Signed) *A. B., etc., Plaintiffs.*

DEFENCE.

[*Title of Court and Action.*]

1. The defendants admit that the statement of facts contained in the statement of claim is substantially correct, except that the reshipment of the cargo on board the "Crosby" was completed by 4 a. m. on the 30th April.

2. The defendants submit to the judgment of the Court to award such a moderate amount of salvage to the plaintiffs under the circumstances aforesaid as to the said Court shall seem meet.

(Signed) C. D., *etc.*, Defendants.

REPLY.

[*Title of Court and Action.*]

The plaintiffs deny the statement contained in the first paragraph of the statement of defence, that the shipment of the cargo was completed by 4 a. m. on the 30th April.

Dated the _____ day of _____ 18__

(Signed) A. B., *etc.*, Plaintiffs.

b. ("The Newcastle.")

STATEMENT OF CLAIM.

[*Title of Court and Action.*]

Writ issued _____ 18__

1. The "Emu" is a steam-tug belonging to the Whitby Steamboat Company, of six tons register, with engines of 40 horse power, nominal, and was at the time of the circumstances hereinafter stated manned by a crew of five hands.

2. Just before midnight on the 22nd of July, 1876, when the "Emu" was lying in Whitby harbor, her master was informed that a screw steamship was ashore on Kettleness Point. He at once got up steam, but was not able, owing to the tide, to leave the harbor till about 1.45 a. m. of the 23rd.

3. About 2 a. m. the "Emu" reached the screw steamship, which was the "Newcastle," which was fast upon the rocks, with a kedge and warp out. The wind was about N., blowing fresh; the sea was smooth, but rising; the tide was flood.

4. The master of the "Emu" offered his services, which were at first declined by the master of the "Newcastle;" shortly afterwards the kedge warp broke and the "Newcastle" swung square upon the land and more upon the rocks. The master of the "Newcastle" then asked the master of the "Emu" to tow him off, and after some conversation it was agreed that the remuneration should be settled on shore.

5. About 3 a. m. those on board the "Emu" got a rope from the "Newcastle" on board, and began to tow. After some towing this rope broke. The tow-line of the "Newcastle" was then got on board the "Emu," and the "Emu" kept towing and twisting the "Newcastle," but was unable to get her off till about 5 a. m., when it was near high water. The master of the "Emu" then saw that it was necessary to try a click or jerk in order to get the "Newcastle" off, and accordingly, at the risk of straining his vessel, he gave a strong click in a northerly direction, and got the "Newcastle" off.

6. The master of the "Emu" then asked if the "Newcastle" was making water, and was told a little only, but as he saw that the hands were at the pumps he kept the "Emu" by the "Newcastle" until she was abreast of Whitby. He then inquired again if any assistance was wanted, and being told that the "Newcastle" was all right, and should proceed on her voyage, he steamed the "Emu" back into Whitby harbor about 7 a. m.

7. About 8 a. m. a gale from N. E., which continued all that day and the next, came on to blow with a high sea. If the "Newcastle" had not been got off before the gale came on she would have gone to pieces on the rocks.

8. By the services aforesaid the "Newcastle" and her cargo and the lives of those on board her were saved from total loss.

9. The "Newcastle" is a screw steamship of 211 tons register, and was bound from Newcastle to Hull with a general cargo and nineteen passengers. The value of the

"Newcastle," her cargo and freight, including passage money, are as follows:

The "Newcastle," \$ _ _ _ ; her cargo, \$ _ _ _ _ ; freight and passage money, \$ _ _ _ _ ; in all, \$ _ _ _ _ .

Plaintiffs claim —

1. The condemnation of the defendants (and their bail) in such an amount of salvage remuneration as to the Court may seem just, and in the costs of this action.
2. Such further and other relief as the nature of the case may require.

Dated _ _ _ _ day of _ _ _ _ 18 _ _

(Signed) A. B., *etc.*, Plaintiffs.

DEFENCE.

[*Title of Court and Action.*]

1. At about 6.45 p. m. on the 22nd of July, 1876, the iron screw steamship "Newcastle," of 211 tons register, propelled by engines of 45 horse power, and manned by twelve hands, her master included, whilst proceeding on a voyage from Newcastle to Hull with cargo and passengers, ran aground off Kettleness Point, on the coast of Yorkshire.

2. The tide at this time was the first quarter ebb, the weather was calm, and the sea was smooth, and the "Newcastle," after grounding as aforesaid, sat upright and lay quite still, heading about E. S. E. Efforts were then made to get the "Newcastle" again afloat by working her engines, but it was found that this could not be done in the then state of the tide.

3. At about 10 p. m. of the said day a kedge, with a warp attached to it, was carried out from the "Newcastle" by one of her own boats and dropped to seaward, and such warp was afterwards hove taut and secured on board the "Newcastle" with the view of its being hove upon when the flood tide made. Several cibles came to the "Newcastle" from Runswick, and the men in them offered their assistance, but their services, not being required, were declined.

4. At about 2 a. m. of the following morning the steam tug "Emu," whose owners, master, and crew are the plaintiffs in this action, came to the "Newcastle" and offered assistance, which was also declined.

5. The flood tide was then making, and by about 2.45 a. m. the "Newcastle" had floated forward, and attempts were made to get the stern of the "Newcastle" also afloat, and the warp attached to the aforesaid kedge was attempted to be hove in, but the said warp having parted, the master of the "Newcastle" endeavored ineffectually to make an agreement with the master of "Emu" to assist in getting the "Newcastle" afloat, and at about 3 a. m. a rope was given to the "Emu" from the port bow of the "Newcastle," and directions were given to the "Emu" to keep the head of the "Newcastle" to the eastward in the same way as it had been kept by the aforesaid kedge anchor and warp. The "Emu" then set ahead and almost immediately the said rope was broken. A coir hawser was thereupon given to the "Emu," and those on board her were directed not to put any strain on it, but to keep the "Emu" paddling ahead sufficiently to steady the head of the "Newcastle," and to keep her head to the eastward. This the "Emu" did and continued to do until about 4.40 a. m., when the "Newcastle," by means of her own engines, was moved off from the ground, and the "Emu" was brought broad on the port bow of the "Newcastle," and the "Emu" had to stop towing and to shift the rope from her port bollard, where it was fast to her towing hook; but the "Newcastle" continuing to go ahead, the said rope had to be let go on board the "Emu," and it was then hauled in on board the "Newcastle." The "Newcastle" under her own steam, then commenced proceeding south, the wind at the time being N. N. W. and light, and the weather fine. It was afterwards ascertained that the "Newcastle" was making a little water in her afterhold, and her hand pumps were then worked, and they kept the "Newcastle" free.

6. The "Emu" proceeded back with the "Newcastle" as far as Whitby, and the "Newcastle" then continued on

her voyage and arrived in the Humber at about 2.45 p. m., of the same day.

7. During the time aforesaid the master, crew, and passengers of the "Newcastle" remained on board the "Newcastle," and no danger was incurred in their so doing.

8. Save as herein appears the defendants deny the truth of the several statements contained in the statement of claim.

9. The defendants have paid into Court and tendered to the plaintiffs for their services the sum of \$_____, and have offered to pay their costs, and the defendants submit that such tender is sufficient.

Dated the _____ day of _____ 18 ____.

(Signed) C. D. *etc.*, Defendants.

(3) *In an Action for Distribution of Salvage:*

STATEMENT OF CLAIM.

[*Title of Court and Action.*]

Writ issued _____ 18 ____.

1. *Describe briefly the salvage services, stating the part taken in them by the plaintiffs, and the capacity in which they were serving.*

2. The sum of \$_____ has been paid by the owners of the ship, *etc.* [*state name of ship or other property saved*] to the defendants, as owners of the ship [*state name of salving ship*], and has been accepted by them in satisfaction of their claim for salvage, but the said defendants have not paid and refuse to pay any part of that sum to the plaintiffs for their share in the said salvage services.

The plaintiffs claim —

1. An equitable share of the said sum of \$_____, to be apportioned among them as the Court shall think fit and the costs of this action.

2. Such other relief as the nature of the case may require.

Dated the _____ day of _____ 18 ____.

(Signed) A. B. *etc.*, Plaintiffs.

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(4) *In an Action for master's wages and disbursements :*a. (*"The Princess."*)

STATEMENT OF CLAIM.

[*Title of Court and Action.*]

Writ issued _____ 18____.

1. The Plaintiff, on the 10th day of February, 1877, was appointed by the owner of the British barque "Princess," proceeded against in this action, master of the said barque, and it was agreed between the plaintiff and the said owner that the wages of the plaintiff as master should be \$ _____ per month.

2. The plaintiff acted as master of the said barque from the said 10th day of February until the 25th day of October, 1877, and there is now due to him for his wages as master during that time the sum of \$ _____.

3. The plaintiff as master of the said barque expended various sums of money for necessary disbursements on account of the said barque; and there is now due to him in respect of the same a balance of \$ _____.

The plaintiff claims—

1. A decree pronouncing the said sums, amounting in the whole to \$ _____, to be due to him for wages and disbursements, and directing the said vessel to be sold and the amount due to him to be paid to him out of the proceeds.

2. Such further and other relief as the nature of the case may require.

Dated the _____ day of _____ 18____

(Signed)

A. B., Plaintiff.

b. (*"The Northumbria."*)

STATEMENT OF CLAIM.

[*Title of Court and Action.*]

Writ issued _____ 18____

1. In or about the month of July, 1873, the plaintiff was engaged by the owners of the British ship "Northumbria"

to serve on board her as her master, at wages after the rate of \$_____ per month, and he entered into the service of the said ship as her master accordingly, and thenceforward served on board her in that capacity and at that rate of wages until he was discharged as hereinafter stated.

2. When the plaintiff so entered into the service of the said ship she was lying at the port of North Shields, in the county of Northumberland, and she thence sailed to Point de Galle, and thence to divers other ports abroad, and returned home to Cardiff, where she arrived on the 1st day of October, 1875.

3. The "Northumbria," after having received divers repairs at Cardiff, left that port on the 5th day of November, 1875, under the command of the plaintiff, on a voyage which is thus described in the ship's articles signed by the plaintiff and her crew before commencing the same, viz.: "A voyage from Cardiff to Bahia or Pernambuco, and any ports or places in the Brazils, or North or South America, United States of America, Indian, Pacific or Atlantic Oceans, China or Eastern Seas, Cape Colonies, West Indies, or continent of Europe, including the Mediterranean Sea, or seas adjacent, to and fro if required, for any period not exceeding three years, but finally to a port of discharge in the United Kingdom or continent of Europe."

4. The "Northumbria," after so leaving Cardiff, met with bad weather and suffered damage, and was compelled to put back to Falmouth for repairs before again proceeding on her voyage.

5. The plaintiff was ready and willing to continue in the service of the "Northumbria," and to perform his duty as her master on and during the said voyage, but the defendants, the owners of the "Northumbria," wrongfully and without reasonable cause discharged the plaintiff on the 23rd day of November from his employment as master, and appointed another person as master of the "Northumbria" on the said voyage in the place of the plaintiff, and thereby heavy damage and loss have been sustained by the plaintiff.

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6. The plaintiff, whilst he acted as master of the "Northumbria," earned his wages at the rate aforesaid; and he also, as such master, made divers disbursements on account of the "Northumbria"; and there was due and owing to the plaintiff in respect of such his wages and disbursements, at the time of his discharge, a balance of \$ _____ which sum the defendants, without sufficient cause, have neglected and refused to pay to the plaintiff.

The plaintiff claims—

1. Payment of the sum of \$ _____, the balance due to the plaintiff for his wages and disbursements, with interest thereon.
2. Ten days double pay, according to the provisions of section 187 of "The Merchant Shipping Act, 1854."
3. Damages in respect of his wrongful discharge by the defendants.
4. The condemnation of the defendants [and their bail] in the amounts claimed by or found due to the plaintiff.
5. To have an account taken [with the assistance of merchants] of the amount due to the plaintiff in respect of his said wages and disbursements, and for damages in respect of such wrongful discharge.
6. Such further and other relief as the nature of the case may require.

Dated the _____ day of _____ 18 _____

(Signed)

A. B., Plaintiff.

DEFENCE.

[*Title of Court and Action.*]

1. The defendants admit the statements made in the 1st, 2nd, 3rd and 4th paragraphs of the plaintiff's statement of claim.

2. Whilst the "Northumbria" was upon her voyage in the said third paragraph mentioned, and before and until she put into Falmouth, as in the said fourth paragraph mentioned, the plaintiff was frequently under the influence of drink.

3. During the night of the 10th November, 1875, and the morning of the 11th November, 1875, whilst a violent gale was blowing and the ship was in danger, the plaintiff was wholly drunk and was incapable of attending to his duty as master of the said ship; and in consequence of the condition of the plaintiff much damage was done to the said ship, and the said ship was almost put ashore.

4. The damage in the fourth paragraph of the statement of claim mentioned was wholly or in part occasioned by the drunken condition of the plaintiff during the said voyage from Cardiff to Falmouth.

5. The defendants having received information of the above facts on the arrival of the said ship at Falmouth, and having made due inquiries concerning the same, had reasonable and probable cause to and did discharge the plaintiff from their employment as master of the said ship on the 23rd November, 1875.

6. The plaintiff, on the 12th day of November, 1875, whilst the said ship was at Falmouth, wrongfully and improperly tore out and destroyed certain entries which had been made by the mate of the said ship in her log-book relating to said sea voyage from Cardiff to Falmouth; and the plaintiff substituted in the said log-book entries made by himself with intent to conceal the true facts of said voyage from the defendants.

7. The defendants bring into Court the sum of \$_____ in respect of the plaintiff's claim for wages and disbursements, and say that the said sum is enough to satisfy the plaintiff's said claim in that behalf. The defendants offered to pay the plaintiff's costs to this time in respect of those two causes of action.

Dated the _____ day of _____ 18____

(Signed) C. D., E. F., &c., Defendants.

VICE-ADMIRALTY REPORTS.

REPLY.

[*Title of Court and Action.*]

The plaintiff denies the several statements contained in the statement of defence [*or as the case may be*].

Dated the _____ day of _____ 18____

(Signed) A. B., Plaintiff.

(5) *In an Action for Seamen's wages:*

STATEMENT OF CLAIM.

[*Title of Court and Action.*]

Writ issued _____ 18____

1. The plaintiff, A. B., was engaged as mate of the British brig "Bristol," at the rate of \$_____ per month, and in pursuance of that engagement, served as mate on board the said brig from the _____ day of _____ 18____, to the _____ day of _____ 18____, and during that time as mate of the said brig earned wages amounting to \$_____. After giving credit for the sum received by him on account, as shown in the schedule hereto, there remains due to him for his wages a balance of \$_____

2. The plaintiffs, C. D., E. F. and G. H., were engaged as able seamen on board the said brig, and having in pursuance of that engagement served as able seamen on board the said brig during the periods specified in the schedule hereto, earned thereby as wages the sums set forth in the said schedule, and after giving credit for the sums received by them respectively on account of the said wages, there remain due to them the following sums, namely:

To C. D., the sum of \$_____

To E. F., " \$_____

To G. H., " \$_____

3. The plaintiffs, I. K. and L. M., were engaged as ordinary seamen on board the said brig, and having served on board the same in pursuance of the said engagement during the periods specified in the schedule hereto, earned thereby

the sums set forth in the same schedule, and after giving credit for the sums received by them respectively, on account of the said wages, there remain due to them the following sums, namely:

To *I. K.*, the sum of \$ _____
 To *L. M.*, " \$ _____

SCHEDULE REFERRED TO ABOVE.

Wages due to *A. B.*, mate, from the _____ 18____,
 to the _____ 18____, _____ months and _____ days at
 \$ _____ per month.

| | | |
|---------------------------|---|----------------------|
| | | \$ _____:_____:_____ |
| Less received on account, | - | \$ _____:_____:_____ |
| Balance due, | - | \$ _____:_____:_____ |

Wages due to *C. D.* able seaman, from the _____
 18____, to the _____ 18____, _____ months and _____
 days, at \$ _____ per month.

| | | |
|---------------------------|---|----------------------|
| | | \$ _____:_____:_____ |
| Less received on account, | - | \$ _____:_____:_____ |
| Balance due, | - | \$ _____:_____:_____ |

[*So on with the wages due to the other Plaintiffs.*]

The plaintiffs claim —

1. The several sums so due to them respectively with the costs of this action.
2. Such double pay as they may be entitled to under sec. 187, of "The Merchant Shipping Act, 1854."
3. Such other relief as the nature of the case may require.

Dated the _____ day of _____ 18____.

(Signed) *A. B., etc.*, Plaintiffs.

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(6) *In an Action for bottomry:*

STATEMENT OF CLAIM.

[*Title of Court and Action*].

Writ issued_____18_____.

1. In the month of July, 1876, the Italian barque "Roma Capitale" was lying in the port of Rangoon in the Pegu Division of British Burmah, and Pietro Ozilia, her master, being in want of funds, was compelled to borrow on bottomry of the said barque and her freight from the Cassa Marittima di Genova the sum of \$_____ for the necessary and indispensable repairs, charges, and supplies of the said vessel in the said port of Rangoon, and to enable her to prosecute her voyage from Rangoon to Akyab and thence to_____.

2. Accordingly, by a bond of bottomry dated the 11th day of the said month of July and duly executed by him, the said Pietro Ozilia, in consideration of the sum of \$_____ lent by the said Cassa Marittima di Genova upon the said adventure upon the said barque and freight at the maritime premium of 23 per cent., bound himself and the said barque and the freight to become payable in respect of the said voyage to pay to the said Cassa Marittima di Genova, their successors or assigns, the sum \$_____ (which included the principal charges and the maritime interest due thereon), within thirty days after the said barque should arrive at her port of discharge; and the said bond provided that the said Cassa Marittima di Genova should take upon themselves the maritime risk of the said voyage.

3. The "Roma Capitale" has since successfully prosecuted her said intended voyage for which the aforesaid bond was granted, and arrived at_____ as her port of discharge on or about the 30th day of March, 1877.

4. Before the issue of the writ in this action the said bond became due and payable, and was duly endorsed by the said Cassa Marittima di Genova to the plaintiffs who thereby became and are the legal holders thereof, and the said sum of \$_____ is now due and owing thereon to the plaintiffs.

The plaintiffs claim —

1. A declaration for the force and validity of the said bond.
2. The condemnation of the said barque "Roma Capitale" and her freight in the sum of \$ _____ with interest thereon at _____ per cent. per annum from the time when the said bond became payable, and in costs.
3. A sale of the said barque and the application of the proceeds of her sale and of her freight in payment to the plaintiffs of the said amount and interest and costs.
4. Such further and other relief as the case may require.

Dated the... day of _____ 18_____.

(Signed) A. B., etc., Plaintiffs.

(7) *In an Action for mortgage :*

STATEMENT OF CLAIM.

[*Title of Court and Action.*]

Writ issued _____ 18_____

1. The above named brigantine or vessel "Juniper" is a British ship belonging to the port of _____ of the registered tonnage of 109 tons or thereabouts, and at the time of the mortgage hereinafter mentioned, Thomas Brock, of _____ was the registered owner of the said brigantine.

2. On the 4th day of July, 1876, $\frac{32}{84}$ parts or shares of the said brigantine were mortgaged by the said Thomas Brock to the plaintiff, to secure the payment by the said Thomas Brock to the plaintiff of the sum of \$ _____, together with interest thereon at the rate of _____ per cent. per annum, on or before the 1st day of July, 1877.

3. The said mortgage of the "Juniper" was made by an instrument dated the 4th day of July, 1876, in the form prescribed by the 66th section of "The Merchant Shipping

Act, 1854," and was duly registered in accordance with the provisions of the said Act.

4. No part of the said principal sum or interest has been paid, and there still remains due and owing to the plaintiff on the said mortgage security the principal sum of \$_____, together with a large sum of money for interest and expenses, and the plaintiff, although he has applied to the said Thomas Brock for payment thereof, cannot obtain payment without the assistance of this Court.

The plaintiff claims—

1. Judgment for the said principal sum of \$_____, together with interest and expenses.
2. To have an account taken of the amount due to the plaintiff.
3. Payment out of the proceeds of the said brigantine now remaining in Court of the amount found due to the plaintiff, together with costs [or to have the said brigantine sold, etc., *as the case may be*].
4. Such further and other relief as the nature of the case may require.

Dated the _____ day of _____ 18__

(Signed) _____ A. B., Plaintiff.

(8) *In an Action between Co-Owners (for account).*

STATEMENT OF CLAIM.

[*Title of Court and Action.*]

Writ issued _____ 18__

1. The "Horlock" is a sailing ship of about 40 tons register, trading between _____ and _____

2. By a bill of sale duly registered on the 11th day of June, 1867, the defendant, John Horlock, who was then sole owner of the above named ship "Horlock," transferred to Thomas Worraker, of _____, $\frac{3}{8}$ th parts or shares of the ships for the sum of \$_____

3. By a subsequent bill of sale duly registered on the 16th December, 1876, the said Thomas Worraker transferred

his said $\frac{32}{4}$ th shares of the ship to George Wright, the plaintiff, for the sum of \$_____

4. The defendant, John Horlock, has had the entire management and the command of the said ship from the 11th day of June, 1867, down to the present time.

5. The defendant has, from time to time, up to and including the 24th September, 1874, rendered accounts of the earnings of the ship to the aforementioned Thomas Worra-ker, but since the said 24th September, 1874, the defendant has rendered no accounts of the earnings of the ship.

6. Since the 16th December, 1876, the ship has continued to trade between_____and_____, and the plaintiff has made several applications to the defendant, John Horlock, for an account of the earnings of the ship, but such applications have proved ineffectual.

7. The plaintiff is dissatisfied with the management of the ship, and consequently desires that she may be sold.

The plaintiff claims—

1. That the Court may direct the sale of the said ship "Horlock."
2. To have an account taken of the earnings of the said ship, and that the defendant may be condemned in the amount which shall be found due to the plaintiff in respect thereof, and in the costs of this action.
3. Such further or other relief as the nature of the case may require.

Dated this_____day of_____18____

(Signed) _____ A. B., Plaintiff.

DEFENCE.

[*Title of Court and Action.*]

1. The defendant denies the statements contained in paragraph two of the statement of claim.

2. The defendant further says that he never at any time signed any bill of sale transferring any shares whatever of

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the said ship "Horlock" to the said Thomas Worraker, and further says that if any such bill was registered as alleged on the 11th June in the said second paragraph (which the defendant denies) the same was made and registered fraudulently and without the knowledge, consent, or authority of the defendant.

3. The defendant does not admit the statements contained in the third paragraph of the statement of claim, and says that if the said Thomas Worraker transferred any shares of the said ship to the plaintiff as alleged (which the defendant does not admit), he did so wrongfully and unlawfully, and that he had not possession of or any right to or in respect of said shares.

4. The defendant denies the statements contained in paragraph five of the statement of claim, and says that he never rendered any such account as alleged therein.

5. The defendant does not admit the statements contained in paragraph six of the statement of claim.

Dated the _____ day of _____ 18____.

(Signed) C. D., Defendant.

REPLY.

[*Title of Court and Action.*]

The plaintiff denies the several statements in the statement of defence.

Dated the _____ day of _____ 18____.

(Signed) A. B., Plaintiff.

(9) *In an Action for Possession:*

STATEMENT OF CLAIM.

[*Title of Court and Action.*]

Writ issued _____ 18____.

1. The plaintiffs are registered owners of 44-64 shares in the British ship "Native Pearl," and such shares are held by them respectively as follows:

Morgan Parsall Griffiths is owner of 16-64 shares, Edmund Nicholls of 8-64 shares, William Meagher of 4-64 shares, Isaac Butler of 8-64 shares, and William Herbert of 8-64 shares.

2. The only owner of the said ship other than the plaintiffs is John Nicholas Richardson, who is the registered owner of the remaining 20-64 shares of the said ship, and has hitherto acted as managing owner and ship's husband of the said ship, and has possession of and control over the said ship and her certificate of registry.

3. The defendant, the said John Nicholas Richardson, has not managed the said ship to the satisfaction of the plaintiffs, and has by his management of her occasioned great loss to the plaintiffs; and the plaintiffs in consequence thereof before the commencement of this action gave notice to the defendant to cease acting as managing owner and ship's husband of the said ship, and revoked his authority in that behalf, and demanded from the defendant the possession and control of the said ship and of her certificate of registry, but the defendant has refused and still refuses to give possession of the said ship and certificate to the plaintiffs, and the plaintiffs cannot obtain possession of them without the assistance of this Court.

4. The defendant has neglected and refused to render proper accounts relating to the management and earnings of the said ship, and such accounts are still outstanding, and unsettled between the plaintiffs and the defendant.

The plaintiffs claim —

1. Judgment giving possession to the plaintiffs of the said ship and of her certificate of registry.
2. To have an account taken, with the assistance of merchants, of the earnings of the ship.
3. A sale of the defendant's shares in the said ship.
4. Payment out of the proceeds of such sale of the balance (if any) found due to the plaintiffs and of the costs of this action.

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5. Such further and other relief as the nature of the case may require.

Dated the _____ day of _____ 18____

(Signed) A. B., etc., Plaintiffs.

(10) *In an Action for Necessaries:*

STATEMENT OF CLAIM.

[*Title of Court and Action.*]

Writ issued _____ 18____

1. The plaintiffs, at the time of the occurrences hereinafter mentioned, carried on business at the port of _____ as bonded store and provision merchants and ship chandlers.

2. The "Sfactoria" is a Greek ship, and in the months of June, July, August and September, 1874, was lying in the said port of _____ under the command of one George Lazzaro, a foreigner, her master and owner, and in the said month of September she proceeded on her voyage to _____

3. The plaintiffs, at the request and by the direction of the said master, supplied during the said months of June, July, August and September, 1874, stores and other necessities for the necessary use of the said ship upon the said then intended voyage to the value of \$ _____, for which sum an acceptance was given by the said George Lazzaro to the plaintiffs; but on the 4th day of February, 1875, the said acceptance, which then became due, was dishonored, and the said sum of \$ _____, with interest thereon from the said 4th day of February, 1875, still remains due and unpaid to the plaintiffs.

4. In the month of August aforesaid the plaintiffs, at the request of the said master, advanced to him the sum of \$ _____ for the necessary disbursements of the said ship at the said port of _____, and otherwise on account of the said ship; and also at his request paid the sum of \$ _____, which was due for goods supplied for the necessary use of the said ship on the said voyage; and of the sums so advanced and paid there still remains due and

unpaid to the plaintiffs the sum of \$_____, with interest thereon from the 5th day of January, 1875, on which last mentioned day a promissory note given by the said George Lazzaro to the said plaintiffs for the said sum of \$_____ was returned to them dishonored.

5. The plaintiffs also at the said master's request, between the 1st of September, 1874, and the commencement of this action paid various sums amounting to \$_____ for the insurance of their said debt.

6. The said goods were supplied and the said sums advanced and paid by the plaintiffs upon the credit of the said ship, and not merely on the personal credit of the said master.

The plaintiffs claim—

1. Judgment for the said sums of \$_____ and \$_____ together with interest thereon.
2. That the defendant (and his bail) be condemned therein, and in costs.

or

2. A sale of the said ship, and payment of the said sums and interest out of the proceeds of such sale, together with costs.
3. Such further and other relief as the case may require.

Dated the _____ day of _____ 18____

(Signed) A. B., etc., Plaintiffs.

(11) *In an Action for condemnation of a Ship or Cargo, etc.:*

STATEMENT OF CLAIM.

[*Title of Court and Action.*]

Writ issued _____ 18____

State briefly the circumstances of the seizure, or, if an Affidavit of the circumstances has been filed, refer to the Affidavit.

A. B. [*state name of person suing in the name of the Crown*] claims—

The condemnation of the said ship _____ [and her cargo, and of the said slaves, or as the case may be],

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on the ground that the said ship, etc., was at the time of the seizure thereof fitted out for or engaged in the slave trade [*or as having been captured from pirates, or for violation of the Act* — — — S — — — *or as the case may be*].

Dated the _____ day of _____ 18____

(Signed) A. B.

(12) *In an Action for Restitution of a Ship or Cargo:*

STATEMENT OF CLAIM.

[*Title of Court and Action.*]

Writ issued _____ 18 — —

State briefly the circumstances of the seizure:

C. D. [*state name of person claiming restitution*] claims—

The restitution of the said vessel _____ [*and her cargo, or as the case may be*] together with costs and damages for the seizure thereof [*or as the case may be*].

Dated the _____ day of _____ 18____

(Signed) C. D., etc., Plaintiffs.

(13) *In a Piracy case, where the captors intend to apply for Bounty, add—*

A. B. further prays the Court to declare—

1. That the persons attacked or engaged were pirates.
2. That the total number of pirates so engaged or attacked was _____ of whom _____ were captured.
3. That the vessel [*or vessels and boats*] engaged was [*or were*] _____ [*and* _____].

Dated the _____ day of _____ 18____

(Signed) A. B.

(14) *In an Action for Recovery of any Pecuniary Forfeiture or Penalty.*

STATEMENT OF CLAIM.

[*Title of Court and Action.*]

Writ issued _____ 18 ____

State briefly the circumstances, and the Act and section of Act, under which the penalty is claimed.

I, A. B., claim to have the defendant condemned in a penalty of \$ _____, and in the costs of this action.

Dated the _____ day of _____ 18 ____

(Signed) _____ A. B.

No. 24.

INTERROGATORIES.

[*Title of Court and Action.*]

Rule 69.

Interrogatories on behalf of the plaintiff A. B. [*or defendant C. D.*] for the examination of the defendants C. D. and E. F. [*or plaintiff A. B., or as the case may be.*]

1. Did not, etc.

2. Have not, etc.

The defendant C. D. is required to answer the interrogatories numbered _____.

The defendant E. F. is required to answer the interrogatories numbered _____.

Dated the _____ day of _____ 18 ____.

(Signed) _____ A. B. [*or C. D., as the case may be.*]

No. 25.

ANSWERS TO INTERROGATORIES.

Rule 69.

[*Title of Court and Action.*]

The answers of the defendant C. D. [*or plaintiff A. B., etc.*] to the interrogatories filed for his examination by the plaintiff A. B. [*or defendant C. D., etc.*]

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In answer to the said interrogatories I, the above named
C. D. [*or A. B., etc.*], make oath and say as follows:

1. _____
2. _____

etc. etc. etc.

| | | |
|--|---|--|
| <p>On the _____ day of _____ 18____,</p> <p>the said C. D. [<i>or A. B., etc.</i>] was</p> <p>duly sworn to the truth of this affi-</p> <p>davit at _____.</p> <p style="text-align: center;">Before me,</p> <p style="text-align: center;"><i>E. F., etc.</i></p> | } | <p>(Signed)</p> <p>C. D. [<i>or A. B.</i>]</p> |
|--|---|--|

No. 26.

Rule 71.

AFFIDAVIT OF DISCOVERY.

[*Title of Court and Action.*]

I, the defendant C. D. [*or plaintiff A. B., etc.*], make oath and say as follows:

1. I have in my possession or power the documents relating to the matters in question in this action, set forth in the first and second parts of the first schedule hereto.

2. I object to produce the documents set forth in the second part of the said first schedule on the ground that [*state grounds of objection, and verify the facts as far as may be.*]

3. I have had, but have not now, in my possession or power the documents relating to the matters in question in this action as set forth in the second schedule hereto.

4. The last mentioned documents were last in my possession or power on [*state when.*]

5. [*Here state what has become of the last mentioned documents, and in whose possession they now are.*]

6. According to the best of my knowledge, information, and belief, I have not now and never had in my possession, custody, or power, or in the possession, custody or power of my solicitor or agent, or of any other person or persons on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy

of or extract from any such document, or any other document whatsoever, relating to the matters in question in this action, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto.

SCHEDULE No. 1.

Part 1.

[*Here set out Documents.*]

Part 2.

[*Set out Documents.*]

SCHEDULE No. 2.

[*Set out Documents.*]

| | | |
|--|---|---|
| <p>On the _____ day of _____ 18____,</p> <p>said <i>C. D.</i> [<i>or A. B., etc.,</i>] was duly sworn to the truth of this affidavit at _____.</p> <p style="padding-left: 100px;">Before me,</p> <p style="padding-left: 100px;"><i>E. F., etc.</i></p> | } | <p>(Signed)</p> <p><i>C. D.</i> [<i>or A. B.</i>]</p> |
|--|---|---|

No. 27.

NOTICE TO PRODUCE.

Rule 72.

[*Title of Court and Action.*]

Take notice that the plaintiff *A. B.* [*or defendant C. D.*] requires you to produce for his inspection, on or before the _____ day of _____, the following documents.

[*Here describe the documents required to be produced.*]

Dated the _____ day of _____ 18____

| | |
|-----------------|---|
| <p>(Signed)</p> | <p><i>A. B.</i>, Plaintiff. [<i>or C. D.</i>, Defendant.]</p> |
|-----------------|---|

To *C. D.*, Defendant,
[*or as the case may be.*]

gg

VICE-ADMIRALTY REPORTS.

No. 28.

Rule 74.

NOTICE TO ADMIT DOCUMENTS.

[*Title of Court and Action.*]

Take notice that the plaintiff, *A. B.* [*or defendant C. D.*] in this action proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or plaintiff*], his solicitor or agent, at _____ on _____, between the the hours of _____ and _____; and the defendant [*or plaintiff*] is hereby required, within *forty-eight hours* from the last mentioned hour, to admit that such of the said documents as are specified as originals were respectively written, signed or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and that such documents as are stated to have been served, sent, or delivered, were so served, sent or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this action.

| Description of Documents. | Dates. | Time and Mode of Service or Delivery, etc. |
|---|--|---|
| [<i>Here briefly describe documents.</i>] | [<i>Here state the date of each document.</i>] | [<i>Here state whether the original or a duplicate was sent by post, or served or delivered, and when and by whom.</i>] |
| (1) <i>Originals.</i> | | |
| (2) <i>Copies.</i> | | |

Dated the _____ day of _____ 18____

(Signed) *A. B.*, Plaintiff [*or C. D.*, Defendant.]

To *C. D.*, Defendant,
[*or as the case may be.*]

No. 29.

NOTICE TO ADMIT FACTS.

Rule 74.

[*Title of Court and Action.*]

Take notice that the plaintiff *A. B.* [*or defendant C. D.*] demands admission of the undermentioned facts, saving all just exceptions.

1. } [*Here state briefly the facts of which admission is demanded.*]
2. }

Dated the _____ day of _____ 18____

(Signed) *A. B.*, Plaintiff [*or C. D.*, Defendant].

To *C. D.*, Defendant,
[*or as the case may be*].

No. 30.

NOTICE OF MOTION.

Rule 81.

[*Title of Court and Action.*]

Take notice that on [*state day of week*] the _____ day of _____, the plaintiff [*or defendant*] will [*by counsel, or by his solicitor, if the motion is to be made by counsel or solicitor*] move the judge in Court [*or in chambers, as the case may be*] to order that [*state nature of order to be moved for. In a notice of motion to vary a report of the registrar, the items objected to must be specified*].

Dated the _____ day of _____ 18____

(Signed) *A. B.*, Plaintiff [*or C. D.*, Defendant].

No. 31.

NOTICE OF TENDER.

Rule 84.

[*Title of Court and Action.*]

Take notice that I have paid into Court, and tender in satisfaction of the plaintiff's claim [*or, as the case may be, if the tender is for costs also, add including costs*] the sum of [*state sum tendered both in letters and figures, and on what terms, if any, the tender is made*].

Dated the _____ day of _____ 18____

(Signed) *C. D.*, Defendant.

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No. 32.

Rule 32.

NOTICE ACCEPTING OR REJECTING TENDER.

[*Title of Court and Action.*]

Take notice that I accept [*or reject*] the tender made by the defendant in this action.

Dated the _____ day of _____ 18 ____

(Signed) A. B., Plaintiff.

No. 33.

Rule 32.

INTERPRETER'S OATH.

You swear that you are well acquainted with the English and _____ languages [*or as the case may be*] and that you will faithfully interpret between the Court and the witnesses.

So help you GOD.

No. 34.

Rule 33.

APPOINTMENT TO ADMINISTER OATHS.

(1) *In Admiralty Proceedings generally:*

(L.S.) [*Title of Court.*]

To [*state name and address of Commissioner*].

I hereby appoint you _____ to be a Commissioner to administer oaths in all Admiralty proceedings in this Court.

(Signed) A. B.,
Judge, or Local Judge in Admiralty.

(2) *In any particular Proceeding:*

(L.S.) [*Title of Court and Action.*]

To [*state name and address of Appointee*].

I hereby authorize you _____ to administer an oath [*or oaths, as the case may be*] to [*state name of person or persons to whom, and proceeding in which the oath is to be administered, or as the case may be*].

(Signed) A. B.,
Judge, or Local Judge in Admiralty.

No. 35.

FORM OF OATH TO BE ADMINISTERED TO A WITNESS. Rule 94.

You swear that the evidence given by you shall be the truth, the whole truth, and nothing but the truth.

So help you GOD.

FORM OF DECLARATION IN LIEU OF OATH.

I solemnly promise and declare that the evidence given by me shall be the truth, the whole truth, and nothing but the truth.

No. 36.

FORM OF OATH TO BE ADMINISTERED TO A DEPONENT. Rule 94.

You swear that this is your name and handwriting, and that the contents of this affidavit are true.

So help you GOD.

FORM OF DECLARATION IN LIEU OF OATH TO BE MADE BY A DEPONENT.

I solemnly declare that this is my name and handwriting, and that the contents of this deposition are true.

No. 37.

FORM OF JURAT.

Rule 99.

[Where Deponent is sworn by Interpretation.]

On the _____ day of _____

18__, the said A. B. was duly sworn to the truth of this affidavit by the interpretation of C. D., who was previously sworn, that he was well acquainted with the English and _____ languages [or as the case may be] and that he would faithfully interpret the said affidavit, at _____

Before me,

E. F., etc.

(Signed) A. B.

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No. 38.

Rule 102.

ORDER FOR EXAMINATION OF WITNESSES.

[Title of Court and Action.]

On the _____ day of _____ 18____

Before _____ Judge, etc.

It is ordered that [*state the names of the witnesses so far as it can be done*], witnesses for the plaintiff [*or defendant*], shall be examined before the judge [*or registrar*], at [*state place of examination*], on [*state day of week*], the _____ day of _____ instant [*or as the case may be*], at _____ o'clock in the _____ noon.

(Signed) *E. F.*,
Registrar, or District Registrar.

No. 39.

Rule 104.

COMMISSION TO EXAMINE WITNESSES.

(L.S.) [Title of Court and Action.]

VICTORIA, ETC.

To [*state name and address of Commissioner*]. Greeting:

Whereas the judge of our Exchequer Court of Canada [*or the local judge in Admiralty of the Exchequer Court for the Admiralty District of* _____] has decreed that a commission shall be issued for the examination of witnesses in the above named action. We, therefore, hereby authorize you, upon the _____ day of _____ 18____, at _____, in the presence of the parties, their counsel, and solicitors, or, in the absence of any of them, to swear the witnesses who shall be produced before you for examination in the said action, and cause them to be examined, and their evidence to be reduced into writing. We further authorize you to adjourn, if necessary, the said examination from time to time, and from place to place, as you may find expedient. And we command you, upon the examination being completed, to transmit the evidence duly certified, together with this commission, to the registry of our said Court at _____

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Given at _____ in our said Court, under the seal
thereof, this _____ day of _____ 18__

(Signed) *E. F.*,
Registrar, or District Registrar.

Commission to examine witnesses.

Taken out by _____

No. 40.

RETURN TO COMMISSION TO EXAMINE WITNESSES.

Rule 107.

[*Title of Court and Action.*]

I, *A. B.*, the commissioner named in the commission
hereto annexed, bearing date the _____ day of _____
18__, hereby certify as follows:

1. On the _____ day of _____ 18__ I opened
the said commission at _____, and in the presence
of [*state who were present, whether both parties, their counsel, or
solicitors, or as the case may be*], administered an oath to and
caused to be examined the under named witnesses who
were produced before me on behalf of the [*state whether
plaintiff or defendant*] to give evidence in the above named
action, viz:

[*Here state names of witnesses.*]

2. On the _____ day of _____ 18__ I proceeded
with the examinations at the same place [*or, at some other
place, as the case may be,*] and in the presence of [*state who
were present, as above,*] administered an oath to and caused
to be examined the under named witnesses who were pro-
duced before me on behalf of [*state whether plaintiff or defend-
ant*] to give evidence in the said action, viz.:

[*State names of witnesses.*]

3. Annexed hereto is the evidence of all the said witnesses
certified by me to be correct.

Dated the _____ day of _____ 18__.

(Signed) *G. H.*,
Commissioner.

VICE-ADMIRALTY REPORTS.

No. 41.

Rule 109.

SHORTHAND WRITER'S OATH.

You swear that you will faithfully report the evidence of the witnesses to be produced in this action.

So help you GOD.

No. 42.

Rule 114.

NOTICE OF TRIAL.

[*Title of Court and Action.*]

Take notice that I set down this action for trial.

Dated the _____ day of _____ 18____.

(Signed)

A. B., Plaintiff.

[*or C. D., Defendant.*]

No. 43.

Rule 127.

REGISTRAR'S REPORT.

(L.S.)

[*Title of Court and Action.*]

To the Honorable the Judge of the Exchequer Court of Canada [*or To the Honorable the Local Judge in Admiralty of the Exchequer Court for the Admiralty District of*_____.

Whereas by your decree of the _____ 18____, you were pleased to pronounce in favor of the plaintiff [*or defendant*], and to condemn the defendant [*or plaintiff*] and the ship _____ [*or as the case may be*] in the amount to be found due to the plaintiff [*or defendant*] [and in costs], and you were further pleased to order that an account should be taken, and to refer the same to the registrar [assisted by merchants] to report the amount due :

Now, I do report that I have [with the assistance of *here state names and description of assessors, if any*], carefully examined the accounts and vouchers and the proofs brought in by the plaintiff [*or defendant*] in support of his claim [*or counter-claim*], and having on the _____ day of _____ heard the evidence of [*state names*] who

were examined as witnesses on behalf of the plaintiff and of [state names] who were examined as witnesses on behalf of the defendant, [and having heard the solicitors (or counsel) on both sides, or as the case may be], I find that there is due to the plaintiff [or defendant] the sum of \$_____ [state sum in letters and figures] together with interest thereon as stated in the schedule hereto annexed. I am also of opinion that the plaintiff [or defendant] is entitled to the costs of this reference [or as the case may be.]

Dated _____ 18__

(Signed) *E. F.*,
Registrar [or District Registrar].

SCHEDULE annexed to the foregoing report.

| | | Claimed. | | Allowed. | |
|--------------|---|----------|------|----------|------|
| | | \$ | Cts. | \$ | Cts. |
| No. | | | | | |
| 1 | [Here state as briefly as possible the several items of the claim with the amount claimed and allowed on each item in the columns for figures opposite the item]. | | | | |
| 2 | | | | | |
| 3 | | | | | |
| 4 | | | | | |
| 5 | | | | | |
| &c. | | | | | |
| Total, — — — | | | | | |

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With interest thereon from the _____ day of _____
18____, at the rate of _____ per cent. per annum
until paid.

(Signed) *E. F.*,
Registrar [*or* District Registrar].

No. 44.

Rule 149.

COMMISSION OF APPRAISEMENT.

[L. S.] [Title of Court and Action.]

VICTORIA, etc.

To the Marshal of our Admiralty District of _____,
[*or* the Sheriff of the County of _____, *or as the
case may be*]. Greeting:

Whereas, the judge of our said Court [*or* the local judge
in Admiralty of our said Court for the Admiralty District
of _____] has ordered that [*state whether ship or cargo,
and state name of ship, and, if part only of cargo, state what part*]
shall be appraised.

We, therefore, hereby command you to reduce into writ-
ing an inventory of the said [ship *or* cargo, etc., *as the case
may be*], and having chosen one or more experienced person
or persons, to swear him or them to appraise the same ac-
cording to the true value thereof, and upon a certificate of
such value having been reduced into writing, and signed
by yourself and by the appraiser or appraisers, to file the
same in the registry of our said Court, together with this
commission.

Given at _____, in our said Court, under the seal
thereof, this _____ day of _____ 18____

(Signed) *E. F.*,
Registrar [*or* District Registrar].

Commission of Appraisement.

Taken out by _____

No. 45.

COMMISSION OF SALE.

Rule 149.

(L.S.) [Title of Court and Action.]

VICTORIA, etc.

To the Marshal of our Admiralty District of _____
 [or the Sheriff, etc., as in Form No. 44]. Greeting:

Whereas, the judge of our said Court [or the local judge, etc., as in Form No. 44], has ordered that [state whether ship or cargo, and state name of ship, and if part only of cargo, what part] shall be sold. We, therefore, hereby command you to reduce into writing an inventory of the said [ship or cargo, etc., as the case may be], and to cause the said [ship or cargo, etc.] to be sold by public auction for the highest price that can be obtained for the same.

And we further command you, as soon as the sale has been completed, to pay the proceeds arising therefrom into our said Court, and to file an account sale signed by you, together with this commission.

Given at _____ in our said Court, under the seal
 thereof, this _____ day of _____ 18____

(Signed) E. F.,
 Registrar [or District Registrar].

Commission of sale.

Taken out by _____

No. 46.

COMMISSION OF APPRAISEMENT AND SALE.

Rule 149.

(L.S.) [Title of Court and Action.]

VICTORIA, etc.

To the Marshal of our Admiralty District of _____
 [or the Sheriff, etc., as in Form No. 44]. Greeting:

Whereas the judge of our said Court [or the local judge, etc., as in Form No. 44] has ordered that [state whether ship or cargo, and state name of ship, and if part only of cargo, what

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part] shall be sold. We, therefore, hereby command you to reduce into writing an inventory of the said [ship *or* cargo, etc., *as the case may be*], and having chosen one or more experienced person or persons to swear him or them to appraise the same according to the true value thereof, and when a certificate of such value has been reduced into writing and signed by yourself and by the appraiser or appraisers, to cause the said [ship *or* cargo, etc., *as the case may be*] to be sold by public auction for the highest price, not under the appraised value thereof, that can be obtained for the same.

And we further command you, as soon as the sale has been completed, to pay the proceeds arising therefrom into our said Court, and to file the said certificate of appraisal and an account sale signed by you, together with this commission.

Given at _____, in our said Court, under the seal thereof, this _____ day of _____ 18__

(Signed) *E. F.*,
Registrar [*or* District Registrar].

Commission of appraisement and sale.

Taken out by _____

No. 47.

Rule 149.

COMMISSION OF REMOVAL.

(L.S.) [Title of Court and Action].

VICTORIA, etc.

To the Marshal of our Admiralty District of _____
[*or* the Sheriff, etc., *as in Form No. 44*]. Greeting:

Whereas the judge of our said Court [*or* the local judge, etc., *as in Form No. 44*] has ordered that the [*state name and description of ship*] shall be removed from _____ to _____ on a policy of insurance in the sum of \$ _____ being deposited in the registry of our said Court; and whereas a policy of insurance for the said sum

has been so deposited. We, therefore, hereby command you to cause the said ship to be removed accordingly. And we further command you, as soon as the removal has been completed, to file a certificate thereof, signed by you, in the said registry, together with this commission.

Given at _____ in our said Court, under the seal thereof, this _____ day of _____ 18____

(Signed) *E. F.*,
Registrar [*or* District Registrar].

Commission of removal.

Taken out by _____

No. 48.

COMMISSION FOR DISCHARGE OF CARGO.

Rule 149.

(L.S.) [*Title of Court and Action.*]

VICTORIA, etc.

To the Marshal of our Admiralty District of _____
[*or* the Sheriff, etc., *as in Form No. 44*]. Greeting.

Whereas the judge of our said Court [*or* the local judge, etc., *as in Form No. 44*] has ordered that the cargo of the ship _____ shall be discharged. We, therefore, hereby command you to discharge the said cargo from on board the said ship, and to put the same into some fit and proper place of deposit. And we further command you, as soon as the discharge of the said cargo has been completed, to file your certificate thereof in the registry of our said Court, together with this commission.

Given at _____ in our said Court, under the seal thereof, this _____ day of _____ 18____

(Signed) *E. F.*,
Registrar [*or* District Registrar].

Commission for discharge of cargo.

Taken out by _____

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No. 49.

Rule 149.

COMMISSION FOR DEMOLITION AND SALE.

(In a Slave Trade Case).

(L.S.)

[Title of Court and Action.]

VICTORIA, etc.

To the Marshal of our Admiralty District of _____

[or the Sheriff, etc., as in Form No. 44]. Greeting:

We hereby command you, in pursuance of a decree of the judge of our said Court [or the local judge, etc., as in Form No. 44] to that effect, to cause the tonnage of the vessel _____ to be ascertained by Rule No. 1 of the 21st section of "The Merchant Shipping Act, 1854" [or by such rule as shall, for the time being, be in force for the admeasurement of British vessels], and further to cause the said vessel to be broken up, and the materials thereof to be publicly sold in separate parts (together with her cargo, if any) for the highest price that can be obtained for the same.

And we further command you, as soon as the sale has been completed, to pay the proceeds arising therefrom into our said Court, and to file an account sale signed by you, and a certificate signed by you of the admeasurement and tonnage of the vessel, together with this commission.

Given at _____ in the said Court, under the seal thereof, this _____ day of _____ 18____.

(Signed) E. F.,

Registrar [or District Registrar].

Commission for demolition and sale.

Taken out by _____

No. 50.

Rule 154.

ORDER FOR INSPECTION.

[Title of Court and Action.]

On the _____ day of _____ 18____.

Before _____ Judge, etc.

The judge, on the application of [state whether plaintiff or defendant] ordered that the ship _____ should be

inspected by [*state whether by the marshal or by the assessors of the Court, or as the case may be*], and that a report in writing of the inspection should be lodged by him [*or them*] in the registry.

(Signed) *E. F.*,
Registrar [*or* District Registrar].

No. 51.

NOTICE OF DISCONTINUANCE.

Rule 155.

[*Title of Court and Action.*]

Take notice that this action is discontinued.

Dated the _____ day of _____ 18____.

(Signed) *A. B.*, Plaintiff.

No. 52.

NOTICE TO ENTER JUDGMENT FOR COSTS.

Rule 155.

[*Title of Court and Action.*]

Take notice that I apply to have judgment entered for my costs in this action.

Dated the _____ day of _____ 18____.

(Signed) *C. D.*, Defendant.

No. 53.

NOTICE OF MOTION ON APPEAL.

Rule 159.

In the Exchequer Court of Canada.

In Admiralty.

Between *A. B.*, Plaintiff;
and
C. D., Defendant.

Take notice that this Honorable Court will be moved on _____ the _____ day of _____ 18____, or so soon thereafter as counsel can be heard, on behalf of the above

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named plaintiff *A. B.* [*or defendant C. D.*], that the judgment [*or order*] of the local judge in Admiralty for the Admiralty District of _____ made herein and dated the _____ day of _____ 18____, [*or if only part of the judgment or order is appealed from say*] that so much of the judgment [*or order*] of the local judge in Admiralty for the Admiralty District of _____ made herein and dated the _____ day of _____ 18____, as adjudges (*or directs or orders as the case may be*) that _____ [*here set out the part or parts of the judgment or order which are appealed from*] may be reversed [*or rescinded*] and that — [*here set out the relief or remedy, if any, sought*] and that the costs of this appeal, and before the local judge in Admiralty, may be paid by the _____ to the _____.

Dated, etc.

Yours, etc.,

X. Y.,

Solicitor, etc., *or*, Agent, etc.

(To the above named defendant), (or plaintiff), and to _____, his solicitor or agent.

No. 54.

Rule 177.

RECEIVABLE ORDER.

Registry of the Exchequer Court of Canada
[*or*, for the Admiralty District of _____]

No. _____.

_____ 18____

[*Title of Court and Action*].

Sir,—

I have to request that you will receive from [*state name of person paying in the money*] the sum of \$ _____ on account in the above named action, and place the same to the credit

of the account of the Registrar of the Exchequer Court of Canada [or, for the Admiralty District of _____].

(Signed) *E. F.*,
Registrar, [or District Registrar].

To the Manager of [state name
or style of bank to which the pay-
ment is to be made], or,

To the Deputy of the Minister
of Finance and Receiver-General
of Canada.

No. 55.

ORDER FOR PAYMENT OUT OF COURT.

Rule 179.

[Title of Court and Action.]

I, _____, Judge of the Exchequer Court of Canada [or as the case may be], hereby order payment of the sum of [state sum in letters and figures], being the amount [state whether found due for damages or costs, or tendered in the action or, as the case may be] to be made to [state name and address of party or solicitor to whom the money is to be paid] out of the [proceeds of sale of ship, etc., or as the case may be] now remaining in Court.

Dated the _____ day of _____ 18 _____

Witness, (Signed) *J. K.*,
E. F., Judge,
Registrar, [or as the case may be].
[or District Registrar].

No. 56.

NOTICE FOR CAVEAT WARRANT.

Rule 180.

[Title of Court, or Title of Court and Action.]

Take notice that I, *A. B.*, of _____ apply for a caveat against the issue of any warrant for the arrest of [state name and nature of property], and I undertake, within three days after being required to do so, to give bail to any

HH

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action or counter-claim that may have been or may be brought against the same in this Court in a sum not exceeding [*state sum in letters*] dollars, or to pay such sum into Court.

My address for service is_____

Dated the_____day of_____18_____

(Signed) A. B.

No. 57.

Rule 180.

CAVEAT WARRANT.

[*Title of Court, or Title of Court and Action.*]

[*State Name of Ship, etc.*]

Caveat entered this_____day of_____18_____, against the issue of any warrant for the arrest of [*state name and nature of property*] without notice being first given to [*state name and address of person to whom, and address at which, notice is to be given*], who has undertaken to give bail to any action or counter-claim that may have been or may be brought in the said Court against the said [*state name and nature of property*].

On withdrawal of caveat add:

Caveat withdrawn the_____day of_____18_____

No. 58.

Rule 181.

NOTICE FOR CAVEAT RELEASE.

[*Title of Court and Action.*]

Take notice that I, A. B., plaintiff [*or defendant*] in the above named action, apply for a caveat against the release of [*state name and nature of property*].

[*If the person applying for the caveat is not a party to the action, he must also state his address and an address for service within three miles of the registry.*]

Dated the_____day of_____18_____.

(Signed) A. B.

No. 59.

CAVEAT RELEASE.

Rule 181.

[*Title of Court and Action.*]

Caveat entered this _____ day of _____ 18____,
against the issue of any release of [*state name and nature of
property*] by [*state name and address of person entering caveat,
and his address for service*].

On withdrawal of caveat add :

Caveat withdrawn this _____ day of _____ 18____

No. 60.

NOTICE FOR CAVEAT PAYMENT.

Rule 182.

[*Title of Court and Action.*]

Take notice that I, *A. B.*, plaintiff [*or defendant*] in the
above named action, apply for a caveat against the payment
of any money [*if for costs, add for costs, or as the case may be*]
out of the proceeds of the sale of [*state whether ship or cargo,
and name of ship, etc.*] now remaining in Court, without notice
being first given to me.

[*If the person applying for the caveat is not a party to the
action, he must also state his address, and an address for service
within three miles of the registry.*]

Dated the _____ day of _____ 18____

(Signed)

A. B.

No. 61.

CAVEAT PAYMENT.

Rule 182.

[*Title of Court and Action.*]

Caveat entered this _____ day of _____ 18____
against the payment of any money [*if for costs, add for costs,
or as the case may be*] out of the proceeds of the sale of [*state
whether ship or cargo, and if ship, state name of ship, etc.*] now
remaining in Court, without notice being first given to [*state
name and address of person to whom, and address at which, notice
is to be given*].

On withdrawal of the caveat, add :

Caveat withdrawn this _____ day of _____ 18____

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No. 62.

Rule 187.

NOTICE FOR WITHDRAWAL OF CAVEAT.

[Title of Court and Action.]

Take notice that I withdraw the caveat [*state whether caveat warrant, release, or payment*] entered by me in this action [*or as the case may be*].

Dated the _____ day of _____ 18____

(Signed) A. B.

No. 63.

Rule 188.

SUBPÆNA.

(L.S.) [Title of Court and Action.]

VICTORIA, etc.

To _____ Greeting:

We command you _____ that, all other things set aside, you appear in person before the judge [*or the registrar, or G. H., a commissioner appointed by an order of our said Court*] at _____ on _____ the _____ day of _____ 18____, at _____ o'clock in the _____ noon of the same day, and so from day to day as may be required, and give evidence in the above named action.

And herein fail not at your peril.

Given at _____ in our said Court, under the seal thereof, this _____ day of _____ 18____

Subpœna.

Taken out by _____

No. 64.

Rule 189.

SUBPÆNA DUCES TECUM.

The same as the preceding form, adding before the words "And herein fail not at your peril," the words "and that you bring with you for production before the said judge [or registrar or commissioner, as the case may be] the following documents, viz.,

[Here state the documents required to be produced.]

No. 65.

ORDER FOR PAYMENT.

Rule 192.

[*Title of Court and Action.*]

On the _____ day of _____ 18__

Before _____

Judge, etc. [*or* Local Judge of the Admiralty District
of _____].

It is ordered that *A. B.* [*plaintiff or defendant, etc.*] do
pay to *C. D.* [*defendant or plaintiff, etc.*] within _____
days from the date hereof the sum of \$ _____ [*state sum*
in letters and figures] being the amount [*or* balance of the
amount] found due from the said *A. B.* to the said *C. D.* for
[*state whether for damages, salvage, or costs, or as the case may be*]
in the above named action.

(Signed) *E. F.*,
Registrar [*or* District Registrar].

No. 66.

ATTACHMENT.

Rule 193.

(L.S.) [*Title of Court and Action.*]

VICTORIA, etc.

To the Marshal of our Admiralty District of _____
[*or* the Sheriff, etc., *as in Form No. 44*]. Greeting.

Whereas the judge of our said Court [*or* the local judge
in Admiralty, etc., *as in Form No. 44*] has ordered [*state*
name and description of person to be attached] to be attached
for [*state briefly the ground of attachment*].

We, therefore, hereby command you to attach the said
_____, and to bring him before our said
judge.

Given at _____ in our said Court, under the seal
thereof, this _____ day of _____ 18__

(Signed) *E. F.*,
Registrar [*or* District Registrar].

Attachment.

Taken out by _____

VICE-ADMIRALTY REPORTS.

No. 67.

Rule 194.

ORDER FOR COMMITTAL.

(L.S.) [Title of Court and Action].

On the _____ day of _____ 18____

Before _____

Judge, etc.

[or Local Judge in Admiralty for the
Admiralty District of _____]

Whereas *A. B.* [state name and description of person to be committed] has committed a contempt of Court in that [state in what the contempt consists], and having been this day brought before the judge on attachment, persists in his said contempt, it is now ordered that he be committed to prison for the term of _____ from the date hereof, or until he shall clear himself from his said contempt.

(Signed) *E. F.*,
Registrar [or District Registrar].

No. 68.

Rule 194.

COMMITTAL.

[Title of Court.]

To _____

Receive into your custody the body [or bodies] of _____
_____ herewith sent to you for the

cause hereinunder written; that is to say,

For [state briefly the ground of attachment].

Dated the _____ day of _____ 18____.

(Signed) *J. K.*,

Witness,

Judge, etc.

E. F.,[or Local Judge in Admiralty for the
Admiralty District of _____].

Registrar,

[or District Registrar].

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No. 69.

MINUTE ON FILING ANY DOCUMENT.

Rule 202.

[*Title of Court and Action.*]

I, *A. B.*, [*state whether plaintiff or defendant*], file the following documents, viz. :

[*Here describe the documents filed.*]

Dated the _____ day of _____ 18____.

(Signed) *A. B.*

No. 70.

MINUTE OF ORDER OF COURT.

Rule 213.

[*Title of Court and Action.*]

On the _____ day of _____ 18____

Before _____ Judge, etc.

[*or Local Judge in Admiralty for the Admiralty District of _____*]

The Judge, on the application of [*state whether plaintiff or defendant*] ordered [*state purport of order*].

No. 71.

MINUTE ON EXAMINATION OF WITNESSES.

Rule 213.

[*Title of Court and Action.*]

On the _____ day of _____ 18____,

Before _____,

Judge, etc.

[*or Local Judge, etc., as the case may be.*]

A. B. [*state whether plaintiff or defendant*] produced as witnesses

[*Here state names of witnesses in full.*]

who, having been sworn [*or as the case may be*], were examined orally [*if by interpretation, add by interpretation of _____*].

VICE-ADMIRALTY REPORTS.

No. 72.

Rule 213.

MINUTE OF DECREE.

[Title of Court and Action.]

On the _____ day of _____ 18____

Before _____,

Judge, etc.,

[or Local Judge, etc., as the case may be].

(1) Decree for an ascertained sum:

The Judge having heard [state whether plaintiff and defendant, or their counsel or solicitors, or as the case may be,] and having been assisted by [state names and descriptions of assessors, if any], pronounced the sum of [state sum in letters and figures] to be due to the plaintiff [or defendant], in respect of his claim [or counter-claim], together with costs [if the decree is for costs]. And he condemned—

(a) In an Action in rem where bail has not been given:

the ship _____ [or cargo ex the ship _____]
or proceeds of the ship _____, or of the cargo ex
the ship _____ or as the case may be] in the
said sum [and in costs].

(b) In an Action in personam, or in rem where Bail has been given:

the defendant [or plaintiff] and his bail [if bail has
been given] in the said sum [and in costs].

(2) Decree for a sum not ascertained:

The judge having heard, etc. [as above] pronounced in favor of the plaintiff's claim [or defendant's counter-claim] and condemned the ship _____ [or cargo, etc., or the defendant or plaintiff] and his bail [if bail has been given] in the amount to be found due to the plaintiff [or defendant] [and in costs]. And he ordered that an account should be taken, and

(a) If the amount is to be assessed by the judge:

that all accounts and vouchers, with the proofs in support thereof, should be filed within _____
days [or as the case may be].

(b) *If the judge refers the assessment to the registrar :*

referred the same to the registrar [assisted by merchants], to report the amount due, and ordered that all accounts, etc. [*as above*].

(3) *Decree on dismissal of action :*

The judge having heard, etc. [*as above*] dismissed the action [*if with costs, add*] and condemned the plaintiff and his bail [*if bail has been given*] in costs.

(4) *Decree for condemnation of a derelict subject to salvage :*

The judge having heard, etc. [*as above*] pronounced the sum of [*state sum in letters and figures*] to be due to A. B., etc., for salvage, together with costs, and subject thereto condemned the said ship_____, [*or cargo or proceeds of ship or of cargo, etc., as the case may be*] as a droit and perquisite of Her Majesty in her office of Admiralty.

(5) *Decree in action for possession :*

The judge having heard, etc., decreed that possession of the ship_____should be given to the plaintiff, and condemned the defendant [and his bail] in costs.

(6) *Decree of condemnation in a slave trade action :*

The judge having heard, etc. [*as above*] pronounced that the vessel, name unknown [*or as the case may be*], seized by H. M. S. "Torch" on the_____day of_____18____, had been at the time of her seizure engaged in or fitted out for the slave trade in contravention of the treaties existing between Great Britain and _____[*or in violation of the Acts 5 Geo. IV. c. 113, and 36 & 37 Vict. c. 88, or as the case may be*], and he condemned the said vessel [together with the slaves, goods, and effects on board thereof] as forfeited to Her Majesty [*or condemned the said vessel and*

slaves as forfeited, etc., but ordered that the cargo should be restored to the claimant, *or as the case may be*].

The judge further ordered that the said slaves [*or the slaves then surviving*], consisting of _____ men, _____ women, and _____ boys and _____ girls, should be delivered over to [*state to whom, or how the slaves are to be disposed of*].

If the vessel has been brought into port, add:

The judge further ordered that the tonnage of the vessel should be ascertained by the rule in force for the admeasurement of British vessels, and that the vessel should be broken up, and that the materials thereof should be publicly sold in separate parts, together with her cargo [*if any* ;

or,

If the vessel has been abandoned or destroyed by the seizors prior to the adjudication, and the Court is satisfied that the abandonment or destruction was justifiable, add:

The judge further declared that, after full consideration by the Court of the circumstances of the case, the seizors had satisfied the Court that the abandonment [*or destruction*] of the vessel was inevitable or otherwise under the circumstances proper and justifiable.

(7) *Decree of restitution in a slave trade action:*

The judge having heard, etc., pronounced that it had not been proved that the vessel _____ was engaged in or fitted out for the slave trade, and ordered that the said vessel should be restored to the claimant, together with the goods and effects on board thereof;

add, as the case may be,

but without costs or damages,

or

on payment by the said claimant of the costs incurred by the seizors in this action;

or

and awarded to the said claimant costs and damages in respect of the detention of the said vessel, and [*referred the*

same to the registrar (assisted by merchants) to report the amount thereof, and] directed that all accounts and vouchers with the proofs in support thereof, if any, should be filed within _____ days.

(8) *Decree in case of capture from pirates:*

The judge having heard, etc., pronounced that the said junk "Tecumseh" [and her cargo] had been at the time of the capture thereof by H. M. S. "Torch" the property of pirates, and condemned the same as a droit and perquisite of Her Majesty in Her office of Admiralty;

or

pronounced that the said junk "Tecumseh" [and her cargo] had prior to her re-capture by H. M. S. "Torch," etc., been captured by pirates from the claimant [*state name and description of former owner*], and he decreed that the same should be restored to the said claimant as the lawful owner thereof, on payment to the re-captors of *one-eighth* part of the true value thereof in lieu of salvage. The judge also directed that the said junk [and her cargo] should be appraised;

If the junk, etc., has been captured after an engagement with the pirates, and if there is a claim for bounty, add:

The judge further declared that the persons attacked or engaged by H. M. S. "Torch," etc., on the occasion of the capture of the said junk were pirates, that the total number of pirates so attacked or engaged was about _____, that _____ of that number were captured, and that the only vessel engaged was H. M. S. "Torch" [*or, as the case may be*].

(9) *Decree of condemnation under Pacific Islanders Protection Acts:*

The judge, having heard, etc., pronounced that the ship _____ had been at the time of her seizure [*or during the voyage on which she was met*] employed [*or fitted out*

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for employment] in violation of the Pacific Islanders Protection Acts, 1872 and 1875, and he condemned the said ship_____ [and her cargo, and all goods and effects found on board, *or as the case may be*] as forfeited to Her Majesty.

The judge further ordered that the said ship_____ [and her cargo, and the said goods and effects] should be sold by public auction, and that the proceeds should be paid into Court.

(10) *Decree of condemnation under Foreign Enlistment Act:*

The judge having heard, etc., pronounced that the ship_____ had been [built, equipped, commissioned, despatched, *or used, as the case may be*] in violation of the Foreign Enlistment Act, 1870, and he condemned the said ship_____ and her equipment [and the arms and munitions of war on board thereof, *or as the case may be*] as forfeited to Her Majesty.

(11) *Decree of condemnation under Customs or Revenue Acts:*

The judge having heard, etc., condemned the ship_____ [or cargo or proceeds, etc., *as the case may be*] as forfeited to Her Majesty for violation of the Act [*state what Act*].

(12) *Decree for pecuniary forfeiture or penalty under Customs Act or other Act:*

The judge having heard, etc., pronounced the said goods to have been landed [*or other illegal act to have been done*] in violation of the Act [*state what Act*] and condemned the Defendant *C. D.* [the owner of the said goods, *or as the case may be*] in the penalty of_____ imposed by the said Act [and in costs].

No. 73.

MINUTES IN AN ACTION FOR DAMAGE BY COLLISION.

A. B., etc.,
 against
 No. _____
 The Ship "Mary."

-
- 18____.
- Jan. 8 A writ of summons (and a warrant) was [*or were*]
 issued to X. Y. on behalf of A. B., etc., the owners
 of the ship "Jane," against the ship "Mary"
 [*and freight, or as the case may be*] in an action for
 damage by collision. Amount claimed, \$1,000.
- " 5 Y. Z. filed notice of appearance on behalf of C. D.,
 etc., the owners of the ship "Mary."
- " 6 X. Y. filed writ of summons.
- " " The marshal filed warrant.
- " 7 Y. Z. filed bailbond to answer judgment as against
 the defendants [*or as the case may be*] in the sum
 of \$1,000, with affidavit of service of notice of
 bail.
- " " A release of the ship "Mary" was issued to Y. Z.
- " 8 X. Y. filed Preliminary Act [*and notice of motion*
for pleadings].
- " " Y. Z. filed Preliminary Act.
- " 10 The judge having heard solicitors on both sides [*or*
as the case may be], ordered pleadings to be filed.
- " 11 X. Y. filed statement of claim.
- " 14 Y. Z. filed defence [*and counter-claim*].
- " 15 X. Y. filed reply.
- " 16 The judge having heard solicitors on both sides [*or*
as the case may be], ordered both plaintiffs and
 defendants to file affidavits of discovery, and to
 produce, if required, for mutual inspection, the
 documents therein set forth within *three days*.
- " 18 X. Y. filed affidavit of discovery.
- " 19 Y. Z. filed affidavit of discovery.
- " 22 X. Y. filed notice of trial.

- Jan. 26 X. Y. produced as witnesses [*state names of witnesses*], who, having been sworn, were examined orally in Court, the said [*state names*] having been sworn and examined by interpretation of [*state name of interpreter*] interpreter of the _____ language. Present [*state names of assessors present, if any*], assessors.
- Y. Z. produced as witnesses, etc. [*as above*].
- The judge, having heard [*state whether plaintiffs and defendants, or their counsel or solicitors, as the case may be*], and having been assisted by [*state names and descriptions of assessors, if any*], pronounced in favor of the plaintiffs [*or defendants*], and condemned the defendants [*or plaintiffs*] and their bail [*if bail has been given*] in the amount to be found due to the plaintiffs [*or defendants*] [and in costs]. And he ordered that an account should be taken, and referred the same to the registrar [assisted by merchants] to report the amount due, and ordered that all accounts and vouchers, with the proofs in support thereof, should be filed within _____ days [*or as the case may be*].
- Feb. 5 X. Y. filed claim, with accounts and vouchers in support thereof [numbered 1 to _____], and affidavits of [*state name of deponents, if any*].
- “ 8 Y. Z. filed accounts and vouchers [numbered 1 to _____] in answer to claim.
- “ 9 X. Y. filed notice for hearing of reference.
- “ 15 X. Y. [*or Y. Z.*] filed registrar's report, etc.

Here insert address for service of documents required to be served on the plaintiffs.

Here insert address for service of documents required to be served on the defendants.

NOTE.—The above minutes are given as such as might ordinarily be required in an action *in rem* for damage by collision, where pleadings have been ordered. In some actions many of these minutes would be superfluous. In others additional minutes would be required.

TABLES OF FEES

TO BE TAKEN BY THE REGISTRARS, MARSHALS AND PRACTITIONERS, ETC., IN ADMIRALTY PROCEEDINGS IN THE EXCHEQUER COURT OF CANADA.

I.—BY THE REGISTRAR.

1. *For sealing or preparing Instruments, etc.*

| | |
|---|---------|
| For sealing any writ of summons or other document required to be sealed, | \$ 0 50 |
| For preparing any warrant, release, commission, attachment, or other instrument required to be sealed, or for attending the execution of any bail-bond, | 2 00 |
| For preparing a receivable order or a receipt for money to be paid out of Court, | 1 00 |
| For preparing and sending any notice, or issuing any appointment, | 50 |
| For preparing any other document for every folio, | 30 |

Note.—The fees for preparing shall include drawing and fair-copying or engrossing.

2. *For Filing.*

| | |
|---|----|
| On filing any instrument or other document, | 20 |
|---|----|

3. *For Evidence, etc.*

| | |
|---|------|
| For attending at examination of any witness, per hour, | 1 00 |
| For administering any oath or declaration, | 20 |
| For taking down and certifying the evidence of any witness examined before him, when the same is not taken down by a shorthand writer, for every folio, | 20 |

4. *For the Trial, etc.*

| | |
|---|------|
| On setting down action for trial, | 1 00 |
| For attendance at the trial of an action, to be paid by the party whose case is proceeding, per hour; | 1 00 |
| Swearing each witness, | 20 |
| On a final decree in an uncontested action, | 2 00 |
| On a final decree in a contested action, | 4 00 |

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For attendance before the judge when any order is made or act done, other than pronouncing a final decree, \$ 1 00

Note.—The above fees shall include the entry of the decree or order in the minute book.

5. *For References.*

| | | | |
|--|---|------|-------|
| For hearing any reference, according to the | { | From | 5 00 |
| case, per day, | | To | 15 00 |
| For preparing the report of a reference, | | | 5 00 |

6. *For Taxations.*

For taxing a bill of costs—
 If the bill does not exceed *ten* folios, 2 00
 For every folio beyond *ten*, 20

7. *For Office Copies, Searches, &c.*

| | |
|---|----|
| For a copy of any document, for every folio (in addition to the fee for sealing), | 10 |
| For search, | 20 |
| For a general search, | 50 |

Note.—No search-fee is to be charged to a party to the action, while the action is pending, or for one year after its termination, or to any seaman.

II.—BY THE ASSESSORS.

| | | | |
|--|---|------|-------|
| For each nautical or other assessor, whether at the examination of witnesses or at the trial of an action, or upon any assessment of damages, or taking of an account, according to the case, in the discretion of the judge, per day, | { | From | 5 00 |
| | | To | 25 00 |

Note.—The above fees shall be paid to the registrar, for the assessors, and in the first instance by the party preferring the claim.

III.—BY A COMMISSIONER TO EXAMINE WITNESSES.

| | |
|---|----|
| For administering any oath or declaration, | 20 |
| For taking down and certifying the evidence of any witness examined before him, when the same is not taken down by a shorthand writer, for every folio, | 20 |

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IV.—BY A COMMISSIONER TO TAKE BAIL.

| | |
|--|---------|
| For attending the execution of any bailbond, . . . | \$ 2 00 |
| For taking any affidavit of justification, . . . | 50 |

V.—BY THE MARSHAL OR SHERIFF.

| | |
|--|------|
| For the service of a writ of summons or subpoena, if served by the marshal or a sheriff, . . . | 1 00 |
| For executing any warrant or attachment, . . . | 4 00 |
| For keeping possession of any ship, goods, or ship and goods (exclusive of any payments necessary for the safe custody thereof), for each day, . . . | 50 |

Note.—No fee shall be allowed to the marshal for the custody and possession of property under arrest, if it consists of money in a bank, or of goods stored in a bonded warehouse, or if it is in the custody of a custom house officer or other authorized person.

| | |
|--|------|
| On release of any ship, goods, or person from arrest, . . . | 2 00 |
| For attending the unlivery of cargo, for each day, . . . | 8 00 |
| For executing any commission of appraisement, sale, or appraisement and sale, exclusive of the fees, if any, paid to the appraiser and auctioneer, . . . | 4 00 |
| For executing any other commission or instrument, . . . | 4 00 |
| On the gross proceeds of any ship, or goods, etc., sold by order of the Court— | |
| If not exceeding \$400, | 4 00 |
| For every additional \$400, or part thereof, . . . | 2 00 |

Note.—If the marshal, being duly qualified, acts as auctioneer, he shall be allowed a double fee on the gross proceeds.

| | |
|---|------|
| For attendance at the trial of an action to be paid by the party whose case is proceeding, per hour, . . . | 1 00 |
| Calling each witness, | 20 |

Note.—If the marshal or his officer is required to go any distance in execution of his duties, a reasonable sum may be allowed for travelling, boat-hire, or other necessary expenses in addition to the preceding fees, but not to exceed ten cents per mile travelled.

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VI.—FEES TO BE TAKEN BY APPRAISERS.

| | |
|-----------------------------------|----------------|
| Each, per appraisement, | { From \$ 2 50 |
| | { To 10 00 |

(This fee may be increased to a sum not exceeding \$30 in the discretion of the judge.)

VII.—BY THE SOLICITOR.

| | |
|---|-------------|
| Retaining fee, | 2 00 |
| For preparing a writ of summons (to include attendances in the registry for sealing the same), . . . | 2 50 |
| For bespeaking and extracting any warrant or other instrument prepared in the registry (to include attendances), | 1 00 |
| For serving a writ of summons or a subpoena, . . . | 1 00 |
| For taking instructions for a statement of claim or defence, | 4 00 |
| For drawing a statement of claim or defence, . . . | 4 00 |
| For taking instructions for any further pleading, . . . | 1 00 |
| For drawing any further pleading, | 2 00 |
| For drawing any other document, for every folio, . . . | 20 |
| For fair-copying or engrossing any document, for every folio, | 10 |
| For taking instructions for any affidavit (unless made by the solicitor or his clerk) or for interrogatories or answers, according to the nature or importance thereof, . . . | { From 1 00 |
| | { To 4 00 |
| For taking instructions for brief, | { From 1 00 |
| | { To 4 00 |
| For attending counsel in conference or consultation, . . . | 2 00 |
| For attending to fee counsel, | 2 00 |
| For attendance on any motion before the judge— | |
| If with counsel, | 2 00 |
| If without counsel, | 4 00 |
| For attending the examination of witnesses before the trial, for each day— | |
| If with counsel, | 4 00 |
| If without counsel, | 8 00 |

| | |
|--|----------------|
| For attendance at the trial for each day, . | { From \$ 4 00 |
| | { To 12 00 |
| For attendance at the delivery of judgment, if reserved, | 2 00 |
| For attendance at the hearing of a reference to the registrar for each day : | |

| | |
|-------------------------------|-------------|
| If with counsel, | { From 4 00 |
| | { To 8 00 |
| If without counsel, | { From 4 00 |
| | { To 20 00 |

| | |
|--|------|
| For any other necessary attendance before the judge, or in the registry, or on the marshal, or on the adverse party or solicitor, in the course of the action, | 1 00 |
|--|------|

Note.—Where more than one document can conveniently be filed, or one document can be filed and another bespoken, at the same time, the fee for one attendance only shall be allowed.

| | |
|---|------|
| For any necessary letter to the adverse party, | 50 |
| For serving any notice, | 20 |
| For extracting and collating any office copy obtained from the registry, for every folio, | 10 |
| For correcting the press, for every folio, | 5 |
| For attending the taxation of any bill of costs, not exceeding <i>ten</i> folios, | 2 00 |
| For every folio beyond <i>ten</i> , | 10 |

VIII.—BY COUNSEL.

| | |
|--|--------------|
| Retaining fee, | 5 00 |
| For settling any pleading, interrogatories, or answers, etc., | { From 5 00 |
| | { To 20 00 |
| For any necessary consultation in the course of the action, | { From 5 00 |
| | { To 10 00 |
| For any motion, | { From 5 00 |
| | { To 15 00 |
| For the examination of witnesses before the trial, for each day, | { From 10 00 |
| | { To 20 00 |
| For the trial of an uncontested action, | 10 00 |

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| | |
|--|----------------------------|
| For the trial of a contested action, for the first day, | { From \$15 00 To 50 00 |
| For each day after the first, | { From 10 00 To 25 00 |
| For attending judgment if reserved, | { From 5 00 To 10 00 |
| For the hearing of a reference to the registrar, for each day, | { From 10 00 To 25 00 |

Note.—Where the same practitioner acts as both counsel and solicitor, he may, for any proceeding in which a counsel's fee might be allowed, charge such fee in lieu of a solicitor's fee.

IX.—BY SHORTHAND WRITERS.

| | |
|---|------|
| For taking down and transcribing the evidence, certifying the transcript, and transmitting the same to the registrar, and supplying three copies thereof to the registrar, per folio, | 20 |
| If for any reason the evidence is not required to be transcribed, for each hour occupied by the examination, | 1 50 |
| Such fees shall, in the first instance, be paid to the registrar for the shorthand writer by the party calling the witness. | |
| If any such fee is not paid by the party liable therefor, it may be paid by any other party to the proceeding and allowed as a necessary disbursement in the cause, or the judge may make such order in respect of such evidence and the disposal of the action or proceeding as to him seems just. | |

Note.—If evidence is taken down by a shorthand writer, no fee for taking down and certifying to such evidence shall be allowed to the registrar or commissioner.

X.—BY WITNESSES.

| | |
|--|------|
| To witness residing not more than three miles from the place to which summoned, per day, | 1 00 |
| To witnesses residing over three miles from such place, | 1 25 |

Barristers and attorneys and solicitors, physicians and surgeons, when called upon to give evidence in consequence of any professional service rendered by them, or to give opinions, per day, \$ 5 00

Engineers and surveyors, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment, per day, 5 00

If the witnesses attend in one cause only, they will be entitled to the full allowance.

If they attend in more than one cause, they will be entitled to a proportionate part in each cause only.

The travelling expenses of witnesses over ten miles shall be allowed according to the sums reasonably and actually paid, but in no case shall exceed ten cents per mile travelled.

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DIGEST OF CANADIAN VICE-ADMIRALTY CASES.

ABANDONMENT.

When it does not constitute the vessel derelict.

See *Derelict. The Charles Forbes*, Young, 172.

ACCIDENT.

See *Inevitable Accident*.

See *Collision*, 85, 86, 155.

ACCOUNTS.

1. The Exchequer Court, under the Admiralty Act, 1891, has jurisdiction to hear and determine actions of account between co-owners of a ship. *Semble*. That in an action by the managing owner of a ship against his co-owner, the indorsement on the writ need not show that there was any dispute as to the amount involved.

The Seaward, 3 E. C. R. 268.

See *Wages of Master*.

ACTS OF PARLIAMENT.

UNITED KINGDOM.

1. 12 Char. II. c. 18, s. 2.
30 Geo. II. c. 7. Aliens settling in colonies.
30 Geo. III. c. 27. Relating to aliens.
37 Geo. III. c. 97. To confirm the American Treaty.
49 Geo. III. c. 107. Offences—Where to be tried.
The Providence, Stewart, 186.
 2. 7 & 8 Wm. III. c. 2, s. 2. Coasting trade of colonies.
26 Geo. III. c. 60, s. 8. "People" equivalent to inhabitants.
34 Geo. III. c. 68, s. 14. Recital in bills of sale of ships.
26 Geo. III. c. 60, s. 18 }
27 Geo. III. c. 19, s. 7 } Change of Master.
The Friends Adventure, *ibid*, 200.
49 Geo. III. c. 49.
52 Geo. III. c. 20. As to importations into Nova Scotia.
The Economy, *ibid*, 446.
- See *Navigation Laws*.

(Acts of Parliament.)

3. An Act to improve the practice and extend the jurisdiction of the High Court of Admiralty of England (August 7, 1840). 2 Stuart, 235; Stockton, 314.

4. An Act to extend the jurisdiction and improve the practice of the High Court of Admiralty (May 27, 1861). 2 Stuart, 247; Stockton, 348.

5. Acts relating to Canada (Imp.) *ibid* 323.

6. Acts 6 and 7 Vict., c. 34, for the apprehension of certain offenders escaping from colonies. *ibid* 342.

7. The Vice-Admiralty Courts Act, 1863. *ibid* 356.

8. An Act to facilitate the appointment of Vice-Admirals, and of officers in Vice-Admiralty Courts in Her Majesty's possessions abroad, and to confirm the past proceedings, to extend the jurisdiction, and to amend the practice of those Courts. "The Vice-Admiralty Courts Act, 1863." Cook, 374; 2 Stuart, 253; Stockton, 356

9. An Act to extend and amend the Vice-Admiralty Courts Act, 1863 (15th July, 1867). Cook, 381; 2 Stuart, 259.

10. An Act to extend the jurisdiction, alter and amend the procedure and practice, and to regulate the establishment of the Court of Admiralty in Ireland (Aug. 20, 1867). 2 Stuart, 261.

11. An Act to regulate the conduct of Her Majesty's subjects during the existence of hostilities between Foreign States with which Her Majesty is at peace (Aug. 9, 1870). 2 Stuart, 286.

12. An Act to provide for the prosecution and trial in Her Majesty's colonies of offences committed within the jurisdiction of the Admiralty (Aug. 1, 1849). *ante*, p. 324.

13. An Act to amend the law respecting the exercise of Admiralty jurisdiction in Her Majesty's dominions and elsewhere out of the United Kingdom. *The Colonial Courts of Admiralty Act*, 1890 (July 25, 1890). Stockton; *ante*, p. 387.

CANADA.

14. An Act respecting investigations into shipwrecks (June 30, 1864). 2 Stuart, 314.

15. An Act respecting the navigation of Canadian waters (May 22, 1868). *ibid*, 315; *ante*, p. 372.

16. The Admiralty Act, 1891. Stockton, 402.

See post, Index, Statutes.

ACTS OF CONGRESS.

1. Act of Congress of the United States of America fixing certain rules and regulations for preventing collisions on the water (April 29, 1864). 2 Stuart, 308.

2. An Act to aid vessels wrecked or disabled in the waters continuous to the United States and the Dominion of Canada (May 24, 1890). Stockton, 184.

ADMIRAL.

The Lord High Admiral—his office, power, and the history of his appointment, duties, etc. *The Little Joe*, Stewart, 394.

ADMIRALTY.

1. The "Admiralty" shall mean the Lord High Admiral or the Commissioners for executing his office.

26 Vict. c. 24, s. 2; 2 Stuart, 254.

2. The Admiralty has full power to appoint any Vice-Admiral or any Judge or other officer. *ibid*, s. 7, 255.

3. Her Majesty may also revoke such appointments under 30 & 31 Vict. c. 45, s. 13, *ibid*, 260, and may also, under the Great Seal, empower the Admiralty to establish Vice-Admiralty Courts in any British possession. *ibid*, s. 16, 261. (But see now The Admiralty Act, 1891, *ante*, p. 402.)

ADMIRALTY JURISDICTION.

1. The Court of Admiralty, except in prizes, exercises an original jurisdiction only, on the ground of established usage and authority. *The Friends*, 1 Stuart, 112.

See *Harbor*, 1.

2. It has no jurisdiction of any contract upon land, and the general rule is, that if the contract be made on land to be executed at sea, or be made at sea to be executed on land, the common law has the preference, and excludes the Admiralty. *ibid*.

3. The cause must arise wholly on the sea, and not within the precincts of any county, to give the Admiralty jurisdiction. *ibid*. (This decision was made in 1837 prior to 3 & 4 Vict. c. 65, and is not now the law so far as it relates to the body of a county.)

4. The cases where the Admiralty has jurisdiction by reason of the subject matter, and when the proceedings are *in rem*, are a class by themselves. *ibid*.

(Admiralty Jurisdiction.)

5. The Admiralty jurisdiction as to torts depends upon the locality, and is limited to torts committed on the high seas. *ibid.* (Now changed by 3 & 4 Vict. c. 65.)

6. Personal torts committed in the harbor of Quebec are not within the jurisdiction of the Admiralty. *ibid.* (See now *contra*, 3 & 4 Vict. c. 65.)

7. The Admiralty entertains jurisdiction of personal torts committed by the master of a vessel on a passenger, if arising on the high seas. *The Toronto*, 1 Stuart, 181.

8. The jurisdiction of the Court in cases of pilotage is undoubted. *The Phæbe*, *ibid.*, 60.

9. It has no jurisdiction in cases where there has been a previous judgment of a Court of concurrent jurisdiction upon the same cause of demand. *ibid.*, 59.

10. It has jurisdiction in relation to claims of pilots for extra pilotage in the nature of salvage for extraordinary services rendered by them. *The Adventurer*, *ibid.*, 101.

11. In suits for damage to a ship by collision, notwithstanding the cause of action may have arisen out of the local limits of the Court.

See Collision.

12. In matters of possession at the suit of the owners or owner of a majority of interests in a ship to obtain possession thereof.

The Mary and Dorothy, 1 Stuart, 187.

13. By 3 & 4 Vict. c. 65, s. 6, the High Court of Admiralty has jurisdiction to decide all claims of salvage, and damage to any sea-going ship or vessel, and to enforce payment thereof, whether such ship or vessel may have been within the body of a county, or on the high seas, at the time when the cause of action accrued.

The Mary Jane, *ibid.*, 267.

14. The ancient jurisdiction restored by the same statute, with respect to claims of material men for necessities furnished to foreign ships. *ibid.*

15. It has no authority to enforce demands for work done or materials furnished in England to ships owned there. *ibid.*

16. Nor has the Vice-Admiralty Court of Lower Canada jurisdiction with respect to claims of material men for materials furnished to ships owned there. *ibid.*

(Admiralty Jurisdiction.)

17. The Court of Vice-Admiralty exercises jurisdiction in the case of a vessel injured by collision in the river St. Lawrence, near the city of Quebec. *The Newham, ibid*, 70.

18. The Admiralty has jurisdiction in cases of possession, at the suit of owners of ships to obtain possession thereof. *The Haidee*, 2 Stuart, 25.

(The nature of the jurisdiction in cases of possession antecedent to the passing of the 3 & 4 Vict. c. 65, which enlarged it, will be seen from the judgments of Lord Stowell upon that subject, which are collected together in Pritchard's Admiralty Digest.)

19. The Admiralty has jurisdiction in cases of collision occurring on the high seas, where both vessels are the property of foreign owners. *The Anne Johanne, ibid*, 43.

20. Difficulties as to the jurisdiction of Admiralty, which had continually occurred from the words of the statute of Richard II., are now wholly removed by the 3 & 4 Vict. c. 65, passed Aug. 7, 1840; "The Admiralty Court Act, 1861" (24 Vict. c. 10); and "The Vice-Admiralty Courts' Act, 1863" (26 Vict. c. 24). *ibid*, pp. 235, 247, 253.

[The Vice-Admiralty Courts' Act, 1863, was repealed by "The Colonial Courts of Admiralty Act, 1890" (Imp.).]

21. As to jurisdiction in respect of forfeitures of ships for offences against "The Foreign Enlistment Act, 1870." See 33 & 34 Vict. ss. 19, 26 and 30; 2 Stuart, pp. 286, 292, 295, 297.

22. "The Admiralty Court Act, 1861," does not extend *per se* to the Vice-Admiralty Courts. *The City of Petersburg*, 2 Stuart, 351; s. c. Young 1.

23. For Admiralty jurisdiction as to Courts of Vice-Admiralty.

See *Vice-Admiralty Courts*.

See *Collision*, 63-95.

25. Her Majesty, by commission under the Great Seal, may empower the Admiralty to establish one or more Vice-Admiralty Courts in any British possession which may have previously acquired independent legislative powers (30 & 31 Vict. c. 45, s. 16). Cook, 383. (This is now regulated by "The Colonial Courts of Admiralty Act, 1890.")

26. The jurisdiction and authority of all the existing Vice-Admiralty Courts are declared to be confirmed to all intents and purposes, notwithstanding that the possession in which any such

(Admiralty Jurisdiction.)

Court has been established may, at the time of its establishment, have been in possession of legislative power. *ibid.*

27. Vice-Admiralty Courts have jurisdiction in all cases of breach of regulations and instructions relating to Her Majesty's navy at sea, and in all matters arising out of droits of Admiralty (26 Vict. c. 24, s. 10). Cook, 376; *ante*, p. 357.

28. The jurisdiction in respect of seizures for breach of the revenue, customs, trade, or navigation laws, or of the laws relating to the abolition of the slave trade, or to the capture and destruction of pirates and piratical vessels, is not taken away or restricted by "The Vice-Admiralty Act, 1863" (26 Vict. c. 24, s. 12). Cook, pp. 376-7. See *ante*, p. 357.

29. Nor, in any other jurisdiction, at the time of the passing of that Act, lawfully exercised by any such Court. *ibid.*

30. The jurisdiction of the Vice-Admiralty Courts, except where it is expressly confined by that Act to the matter arising within the possession in which the Court is established, may be exercised, whether the cause or right of action has arisen within or beyond the limits of such possession. *ibid.*, Cook, 376; *ante*, p. 357.

31. Vice-Admiralty Courts have jurisdiction in respect of seizures of ships and vessels fitted out or equipped in Her Majesty's dominions for warlike purposes without Her Majesty's license in contravention of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90).

32. The Court has jurisdiction to entertain a suit promoted by the owners of a towed vessel against the tug for damages sustained by the tow, through the negligent navigation of the tug, having been brought into collision with another vessel. *The William*, Cook, 171.

33. While the Court can enforce the payment of reasonable towage, it cannot award damages for breach of an alleged towage contract; *e. g.*, the refusal of a vessel to carry out an agreement to employ a particular tug. *The Euclid*, Cook, 280.

34. The Dominion Parliament may confer on the Vice-Admiralty Courts jurisdiction in any matter of shipping and navigation within the territorial limits of the Dominion. *The Farewell*, Cook, 282.

35. Where an Act of the Dominion Parliament is in part repugnant to an Imperial statute, effect will be given to its enactments in so far only as they agree with those of the Imperial statute. *ibid.*

(Admiralty Jurisdiction.)

36. The Court will be guided by circumstances, in exercising or declining to exercise jurisdiction, in the matter of suits for wages by foreign seamen, when the consul of the country to which the vessel proceeded against belongs protests against the further prosecution of the suit. *The Bridgewater*, Cook, 257; *The Monark*, Cook, 341.

37. Where a vessel under charter was injured by collision caused by another vessel, the charter party providing that in case of damage the hiring should cease until she could be repaired: *Held*, that an action by the charterers against the offending ship for the detention would lie. *The Nettlesworth*, Cook, 363.

38. The Vice-Admiralty Court at Quebec has no jurisdiction over claims between owners when the ship in relation to which such claims are asserted is registered in another province as in the province of Nova Scotia. *The Edward Barrow*, Cook, 212.

39. The jurisdiction conferred by the Vice-Admiralty Courts Act, 1863, does not, in the case of damage by a ship to a wharf, extend so far as to enable the Court to award consequential damages occasioned to the traffic of a lessee. *The Barcelona*, Cook, 311.

40. The Court cannot exercise jurisdiction so as to give effect to an agreement between the owner and master of a vessel where the duties to be performed by the latter are miscellaneous and not exclusively those of a master. *The Royal*, Cook, 326.

41. In so far as regards Canadian registered vessels, the Court can entertain claims for masters' and seamen's wages if the amount due is or exceeds two hundred dollars, and this under the Dominion statute, the Seamen's Act, 1873. *ibid.* See *contra*. *The Jonathan Weir*, Stockton, 79. But see note *ibid*, p. 80, *contra*.

42. The Vice-Admiralty Courts Act, 1863, has not affected or repealed the 189th and 191st sections of the Merchant Shipping Act, 1854. *The Royal*, Cook, 326.

43. The 189th section of the latter Act applies to foreigners as well as to British vessels. *ibid*.

44. Since the passing of the statute 26 & 27 Vict. c. 24, s. 10 (The Vice-Admiralty Courts Act, 1863), the Court has jurisdiction to entertain a claim for damage to a railway car standing on a wharf within the limits of a county, by the hawser of the vessel coming in contact with the car and overturning it. *The Teddington*, Stockton, 45.

(Admiralty Jurisdiction.)

45. A foreign steamship, the E., while in the harbor of St. John, N. B., loading a cargo of deals, bought and received on board a quantity of coals for the use of the ship. The coals were purchased to be delivered in the bunkers of the steamer, and the coal merchant employed a third party to put the coals on board. The steam power to hoist the coals on board was furnished by the E. The plaintiff was employed by the third party to put the coals on board, and while so employed was injured by the breaking of the hoisting rope. *Held*: That an action could not be maintained against the steamer; that the Court had no jurisdiction; and that the Vice-Admiralty Courts Act, 1863, sec. 10, sub-sec. 6, did not confer authority to entertain such an action. *The Enrique*, Stockton, 157.

(In view of recent decisions it is submitted this case must be considered overruled. See note to this case, Stockton, 161, *et seq.*)

ADMIRALTY SUITS.

1. All Admiralty suits in the British Courts are summary causes, and justice is administered *levato velo*. *The Newham*, 1 Stuart, 70.

ADVOCATES.

1. All persons entitled to practice as advocates, barristers-at-law, proctors, attorneys-at-law, or solicitors in the Supreme Court of a British possession, shall be entitled to practice in the same respective capacities in the Vice-Admiralty Court or Courts of such possession, and shall have therein all the rights and privileges respectively belonging to advocates, barristers-at-law, proctors, attorneys-at-law, and solicitors, and shall in like manner be subject to the authority of the person for the time being lawfully exercising the office of judge of such Court. 30 & 31 Vict. c. 45, s. 15. Cook. 383.

2. Non-payment of fees received by advocate or proctor for Registrar is a breach of discipline of which the Court may take notice in a summary manner. *Ex parte Drolet*, 2 Stuart, 1.

See *Proctors*.

AFFIDAVITS.

See *Evidence*.

ALIENS.

1. They do not become British subjects by the oath of allegiance, and are not privileged by the license of the Governor of Nova Scotia. *The Providence*, Stewart, 186.

For statutes relating to, see Stockton, *ante*, p. 328. R. S., C. c. 113.

AMBASSADORS.

1. They cannot grant licenses to authorize the enemy to trade with the British dominions. *The Sally Ann*, Stewart, 367.
2. Representatives of ambassadors are entitled to credit without further evidence. *The Amanda*, *ibid*, 442.
3. For the mode of proceeding upon an application after sentence, see *ibid*, 442.

AMENDMENT.

See *Practice*.

See note to *The Maud Pye*, Stockton, p. 103.

See *Error*.

AMERICAN WAR.

1. The declaration of war by the United States in 1812 against Great Britain did not place the two countries in a complete state of war till the order for reprisals by the British Government, and American property found in the British dominions not liable to be seized on the breaking out of hostilities. *The Dart*, Stewart, 301.

APPEAL.

1. The appellate jurisdiction of the High Court of Admiralty from Courts of Vice-Admiralty is by 3 & 4 Will. 4, c. 41, transferred to the Judicial Committee of Privy Council. 1 Stuart, 5.
2. An appeal from a decree or order of a Vice-Admiralty Court lies to Her Majesty in Council; but no appeal shall be allowed, save by permission of the judge, from any decree or order not having the force or effect of a definitive sentence or final order (26 Vict. c. 24, s. 22); appeal to be made within six months. s. 23, 2 Stuart, 257. See also *The Teddington*, Stockton, 65 n.
(See now, however, "The Admiralty Act, 1891.")

APPENDIX.

1. Commission of Vice-Admiral under the Great Seal of the High Court of Admiralty of England, to James Murray, Captain-General and Governor-in-Chief in and over the Province of Quebec in America, dated March 19, 1764. 1 Stuart, 370.
2. Commission under the Great Seal of the High Court of Admiralty of England, appointing Henry Black, Judge of the Vice-Admiralty Court of Lower Canada, dated October 27, 1838. *ibid*, 376.

(Appendix.)

3. Commission under the Great Seal of Great Britain for the trial of offences committed within the jurisdiction of the Admiralty of England, dated October 30, 1841. *ibid*, 380.

4. Opinion of Kerr, J., in the following cases:

The Camillus, *ibid*, 383.

The Coldstream, *ibid*, 386.

5. The several commissions in continuation of the above commission of vice-admiral down to the present time, with their respective dates. *ibid*, 390.

6. The several judges of the Vice-Admiralty Court of Quebec since the cession of the country to the Crown of Great Britain. *ibid*, 391.

7. For contents of, in 2 Stuart, see p. 233 thereof.

8. For contents of, in Cook, see p. 372 thereof.

APPOINTMENT.

1. Of Vice-Admiral, or any Judge, Registrar, Marshal, or other officer of a Vice-Admiralty Court established in British possessions. 26 Vict. c. 24, ss. 3, 4, 5, 6 and 7. 2 Stuart, 254.

(See now, however, "The Admiralty Act, 1891.")

APPRAISEMENT.

1. An appraisement of a derelict ship was objected to on the grounds (1) That the appraisers had been chosen by the proctor for the salvors; (2) That the writ had not been directed to the marshal or to the commissioners, but to the appraisers themselves. *The Cambridge*, Young, 63.

2. Directions as to proper method of executing appraisement of ship and cargo, see *The Regina*, *ibid*, 107.

3. Where an appraisement is ordered by the Court at the instance of the salvors, with a view to a decree, and has been duly made by reliable parties, the Court will not allow it to be questioned. *The S. B. Hume*, *ibid*, 228.

4. After two commissions of appraisement had been issued, and the returns in both cases found too high, so that no sale could be effected, the Court fixed an upset price, ordered a sale at short notice, and made a decree upon the proceeds thereof. *The Cambridge*, *ibid*, 64.

(*Appraisement.*)

5. A commission of sale may issue in the first instance. *The Nordcap*, Stockton, p. 173.

6. See Rules 145 to 154 of 1893, for present practice as to appraisement and sale.

ARTS AND SCIENCES.

1. They are protected from the operations of war. *The Marquis de Somerueles*, Stewart, 482.

ASSAULT.

1. As to the authority of the master of a merchantman to inflict punishment on a passenger who refuses to submit to the discipline of the ship. *The Friends*, 1 Stuart, 118.

2. Assault and battery, and oppressive treatment by the master of a ship upon a cabin passenger—charge sustained. *The Toronto*, *ibid*, 170.

3. No words of provocation whatever will justify an assault. *ibid*.

4. If provoking language be given, without reasonable cause, and the party offended be tempted to strike the other, and an action brought, the Court will be bound to consider the provocation in assessing the damages. *ibid*.

5. To constitute such an assault as will justify moderate and reasonable violence in self-defence, there must be an attempt, or offer, with force and violence, to do a corporal hurt to another. *ibid*.

6. In an action against the master of a ship chartered by the East India Company, for an assault and false imprisonment—a justification on the ground of mutinous, disobedient, and disorderly behavior sustained. *The Coldstream*, *ibid*, 386.

7. As to the authority of the master of a merchantman to put a seaman in irons for disobedience, neglect of duty, and conduct tending to induce a mutiny. *The Bridgewater*, Cook, 252.

8. He may correct not only by personal chastisement, but by confinement or imprisonment on board the ship. *ibid*.

9. To accomplish his purpose, deadly weapons, in general, cannot be employed; but cases of necessity may justify their use, and, in the event of mutiny, any force and any weapon may be used which the urgency requires to repress it. *ibid*.

ASSESSORS.

1. Opinion of Captain Henry W. Bayfield, R. N., commanding naval and surveying service in the River and Gulf of St. Lawrence in the following cases: *The Cumberland*, 1 Stuart, 79; *The Nelson Village*, *ibid*, 156; *The Leonidas*, *ibid*, 230.

2. Opinion of Capt. Edward Boxer, R. N., C. B., in the following cases: *The John Munn*, *ibid*, 265; *The By-Town*, *ibid*, 278.

3. Opinion of Lieut. Edward D. Ashe, R. N., in the following cases: *The Roslin Castle* and *The Glencairn*, *ibid*, 306; *The Niagara* and *The Elizabeth*, *ibid*, 316-220.

4. Opinion of Capt. Jesse Armstrong in the following cases: *The Niagara* and *The Elizabeth*, *ibid*, 316-320.

5. As to practice when nautical skill and knowledge are required (Sir James Marriott's Formulary, 159).

6. Opinions in the following cases in 2 Stuart: *The Secret*, 133; *The Hibernian*, 155; *The Thames*, 222; *The Wavelet*, 355; *The Chase*, 361, 369.

7. Opinions in the following cases in Cook: *The Quebec* and *Charles Chaloner*, 27; *The Quebec*, 33, 41; *The Underwriter* and *Lake St. Clair*, 54; *The Agamemnon*, 63; *The Churchill* and *Normanton*, 72; *The Frank*, 91; *The Rosa* and *Ranger*, 102; *The Eliza Keith* and *Langshaw*, 112; *The Earl of Lonsdale*, 161; *The William*, 174; *The Attila*, 202; *The General Birch* and *Progress*, 240; *The Princess Royal* and *Rubens*, 247; *The Margaret M.*, 270; *The Lombard* and *Farewell*, 289; *The Monica*, 314; *The Signe* and *Rose C.*, 366.

See *Collision*, No. 46.

ASSIGNMENT.

See *Bottomry Bond*, *Lien*, *Salvage*, 1, 2. Cook, 178.

1. Except in case of bottomry, a maritime lien cannot be assigned. Stockton, *ante*, p. 139, note.

ATTACHMENT.

1. Attachment awarded against a master for taking out of the jurisdiction of the Court his vessel, which had been regularly attached. *The Friends*, 1 Stuart, 72.

2. Application for an attachment for contempt for resisting the process of the Court rejected; the statement of the officer being contradicted by the affidavits of two other persons present at the arrest. *The Sarah*, *ibid*, 86.

(Attachment.)

3. Application for an attachment for contempt against a magistrate, first seized of a seaman's suit, for having issued a warrant and arrested the seaman whilst attending his proctor for the purpose of bringing the suit, rejected. *The Isabella, ibid*, 134.

4. Attachment decreed for contempt in obstructing the marshal in the execution of the process of the Court. *The Della, ibid*, 207.

ATTORNEY-GENERAL.

1. During the absence of the Attorney-General, the powers and duties of the office devolve upon the Solicitor-General. *The Dumfriesshire*, 1 Stuart, 245.

2. In New Brunswick, the like rule is laid down by Act of Assembly. 52 Vict. c. 6, s. 2 (1889), p. 92.

BAIL.

1. The bail of a party is an incompetent witness on his behalf. *The Sophia*, 1 Stuart, 219.

[This was decided in 1839, and is not now law.]

BATEAU.

See *Jurisdiction*, 12—1 Stuart, 213.

BERTH.

See *Foul Berth; Collision*, 3.

BERLIN.

See *Decrees*.

BLACK.

The Hon. Henry, C. B.

1. Opinions of, noticed by the Chief Justice of Nova Scotia, in 2 Stuart, 348; Young, 1.

See *Prefatory notice* to same volume.

2. He was judge of Quebec Court from 1836 to 1873. Cook, 413.

BLOCKADE.

1. Of Martinique—evidence of, and knowledge of the parties. *The Nancy*, Stewart, 28.

2. Of the same place—closely blockaded from June 16, 1803, to the end of May, 1814. A vessel taken two months after the blockade had ceased, restored with costs. *The Betsey, ibid*, 39.

(Blockade.)

3. Of Curacoa—excuses for breaches of insufficient. *The Elizabeth*, *ibid*, 80.

4. Merely carrying passengers no excuse for breaking a blockade. *The Tamaahmah*, *ibid*, 254.

5. As to a general blockade—of all places under the government of France—Hamburg within its terms. Cargo brought from a blockaded port by land, and shipped in an open port, not confiscable. *The Thomas Wilson*, *ibid*, 269.

6. Of Copenhagen and Zealand did not extend to other Danish ports. *The Express*, *ibid*, 292.

7. Of Leghorn broken by bringing goods thence by sea to Civita Vecchia. *The Marquis de Somerueles*, *ibid*, 445.

8. Of New York. It must be *de facto* as well as a notification. The blockade of New York commenced June 22, 1813. After public notification, the actual investment constitutes a complete blockade without further notice. *The Republican*, *ibid*, 571.

9. When a blockade has been known to exist the claimant must prove the relaxation; but where it is not known that a blockade has been commenced, it is for the captors to establish it by evidence. Licensed vessels not affected by an order for blockade, when such appears to have been His Majesty's intention. A blockade affects the enemy only *de facto*—neutrals *de jure*. *The Orion*, *ibid*, 497.

10. When a blockade has been notified publicly, no further information is necessary, and if a vessel knowing of such notification sails to the port and finds it blockaded, it is a breach of the blockade. *The Carlotta*, *ibid*, 539.

11. Vessels associated for a blockade entitled to share in captures of the enemy's property, though driven on shore and seized there. *The Flight*, *ibid*, 559.

BOTTOMRY BOND.

1. Jurisdiction in respect of bottomry or *respondentia* bonds confirmed by the "Vice-Admiralty Courts Act, 1863." See 2 Stuart, p. 255.

2. Advances, which may become the subject of bottomry, must be advances made for the service of the ship during the particular voyage for which she is engaged. *The Adonis*, 2 Stuart, 125.

(Bottomry Bond.)

3. A bottomry bond given by the master after the advances had been made is valid, provided they were made with an understanding that such bond should be given. *ibid.*

4. The validity of the bond is not affected by the circumstance of the money being advanced before an intervening voyage if given for advances necessary for the vessel to prosecute and complete the original voyage. *ibid.*

5. Unless fraud or collusion is proved, or that other credit existed, every fair presumption is to be allowed to uphold the bond. *ibid.*

6. The ports of the Dominion of Canada are to be accounted "home ports" in relation to each other, and a bottomry bond given on a Canadian vessel in a Canadian port cannot be enforced within the jurisdiction of the Admiralty. *The Three Sisters, ibid*, 370; s. c. Young, 149.

7. Admiralty Courts recognize the negotiability of bottomry bonds, but aid their transfer reluctantly. *The City of Manitowoc, Cook*, 178.

8. A vessel owned and registered in New Brunswick was sent with a cargo of deals from that province to Queenstown, Ireland, the intention being to sell her to best advantage, after arrival and discharge of cargo. Efforts to sell the vessel were not successful, and after remaining some time at Queenstown, the agent, by directions of the owner, instructed the captain to return with the vessel in ballast to New Brunswick. Unable to get needed funds from the owner or agent to make necessary disbursements for return voyage, the captain, after due notice, borrowed from plaintiff the required amount on bottomry and brought the vessel back to New Brunswick. After her arrival, the bondholder, not being able to obtain payment, began suit for recovery of the amount. The owner and mortgagees of the vessel objected to the validity of the bond, on the ground that, under the circumstances, the voyage was ended at Queenstown; that the vessel required no repairs for a new voyage; was in no distress, and that the captain had no right to give the bond. But *Held*: That as the vessel was sent for sale, and that not being effected, the return was but a continuation of the voyage across; that Queenstown was a foreign port; that as the captain was unable to get necessary funds in any other way, he was justified in borrowing on bottomry, and that the bond must be upheld. *The Elysia A., Stockton*, 28.

(Bottomry Bond.)

9. The hypothecation of a ship is only justified when it is done to secure amounts due for necessary repairs to enable the ship to proceed with the voyage, or for necessities or provisions required for the same purpose. Furthermore, in order to enable the creditor to benefit by the hypothecation, the following elements must be present in this transaction: (a) the repairs must be performed and the necessities or provisions supplied on the express condition that the claim is to be secured by a bond; (b) there must be a total absence of personal credit on the part of the owner or master; (c) before pledging the ship, the master should, if it was at all possible to do so, have communicated with the owner; and (d) there must not be sufficient cash or credit available to the master to pay the amount of the indebtedness so incurred.

(2) A master gave a bottomry bond on his ship for repairs executed some time previous to the voyage he was then prosecuting, and which were done entirely on his personal credit at the time and upon the distinct understanding that he would not be required to pay for them until his return from another voyage. It also appeared that the master had not communicated with the owners before entering into the bond, although means of communication were open to him; and it was, moreover, shown that the ship had enough credit at the place where the bond was made to pay the whole amount of the claim. *Held*: That the bond was void.

(3) A ship-broker's commissions cannot be the subject of a bottomry bond. *The St. Joseph*, 3 E. C. R. 344.

BROUGHAM (LORD).

1. The Imp. Act 14 & 15 Vict. c. 99, is commonly called Lord Brougham's Act. It makes the evidence of interested persons admissible. *The Courier*, 2 Stuart, p. 95.

CASES.

For list of, under sailing regulations, see *ante*, p. 385.

CERTIFICATES OF ORIGIN.

As to ground of confiscation. *The American*, Stewart, 286.

CLEARING.

1. Clearing out to Boston, entering, trading, and clearing out from thence to Halifax was an importation contrary to the statute, and both vessel and cargo were accordingly condemned. *The Union*, Stewart, 98.

COLLISION.

1. There are four probabilities under which a collision may occur—

- (1) It may occur from the fault or misconduct of the vessel suffering from the collision.
- (2) Or, the accident may have happened from unavoidable circumstances, without fault on the part of either vessel.
- (3) Or, both parties may be to blame, as where there has been a want of strict or due diligence on both sides.
- (4) Or, the loss and damage may be owing to the fault or misconduct of the vessel charged as the wrong doer.

In the first two cases, no action lies for the damage arising from the collision.

In the third case, the law apportions the loss between the parties, as having been occasioned by the fault of both of them.

In the fourth case, the injured party is entitled to full compensation from the party inflicting the injury. *The Cumberland*, 1 Stuart, 75; *The Nelson Village*, *ibid*, 156; *The Grace*, Stockton, 26 n.

(The above possibilities of loss by collision were thus noted by Lord Stowell in *The Woodrop-Sims*, 2 Dods, 83.)

2. Owners of vessels are not exempt from their legal responsibility, notwithstanding that their vessel was under the care and management of a pilot. *The Cumberland*, 1 Stuart, 75.

3. A vessel giving a foul berth to another vessel is liable in damages for collision done to the vessel to which such foul berth was given by her, although the immediate cause of the collision was a *vis major*, and no unskilfulness or misconduct was imputable to the offending vessel after giving such foul berth. *ibid*.

4. In a case of collision between two ships ascending the river St. Lawrence, the Court, assisted by a captain of the Royal Navy, pronounced for damages, holding that when two vessels are crossing each other in opposite directions, and there is doubt of their going clear, the vessel upon the port or larboard tack is to bear up and heave about for the vessel upon the starboard tack. *The Nelson Village*, *ibid*, 156.

5. In cases of collision arising from negligence or unskilfulness in the management of the ship doing the injury, a pilot having the control of the ship is not a competent witness for such ship, without a release, although the master is. *The Lord John Russell*, *ibid*, 190.

See *Witnesses*.

(The law as to competency of witnesses is now different. See *The Courier*, 2 Stuart, p. 95.)

(Collision.)

6. The ship held liable for collision although a pilot on board. *The Lord John Russell*, 1 Stuart, 190.

7. Where one ship is at anchor, it augurs great want of skill and attention, in a harbor like that of Quebec, for a ship under sail to be so brought to as to run foul of her. *ibid.*

8. In this case damages awarded in case of collision in the harbor of Quebec. *ibid.*

9. A pilot act, which obliges vessels going out or coming into port to receive a pilot under a penalty or forfeiture of half pilotage, is not compulsory, but is optional. The ship need not take a pilot if it prefers to pay the penalty or forfeiture. *The Creole, ibid*, 199.

10. The circumstance of having a pilot on board, and acting in conformity with his directions, does not operate as a discharge of the responsibility of the owner. *ibid.*

11. Vessels are required of a dark night to show their position by a fixed light, while at anchor in the harbor of Quebec; and the want of such light will amount to negligence, so as to bar a claim for any injury received from other vessels running foul of them. *The Mary Campbell, ibid*, 222.

12. The master may avail himself of the wind and tide, and sail into port by night as well as by day. *ibid.*

13. By-laws of Trinity House, respecting lights, not abrogated by desuetude or non-user. *ibid.*

14. The hoisting of a light in a river or harbor, at night, amid an active commerce, is a precaution imperiously demanded by prudence, and the omission cannot be considered otherwise than as negligence *per se.* *ibid.*

15. By-law of the Trinity House of April 12, 1850, requires a distinct light in the fore-rigging "during the night." *ibid*, 225, note.

16. In a case of collision against a ship for running foul of a floating-light vessel, the Court pronounced for damages. *The Miramichi, ibid*, 237.

See No. 164, *The Minnie Gordon*, Stockton, 95.

17. In such case the presumption is gross negligence or want of skill, and the burthen is cast on the ship master to repel that presumption. *The Miramichi*, 1 Stuart, 237.

18. How ships moored are protected against the intrusion of ships under sail. *ibid*, p. 241.

See *The Neptune the Second*, 1 Dod. 467.

(Collision.)

19. The omission to have a light on board in a river or harbor at night amounts to negligence *per se*. *The Dahlia, ibid*, 242.

20. Every night in the absence of the moon is a dark night in the purview of the Trinity House regulations of the 28th June, 1805. *ibid*.

21. More credit is to be given to the crew who are on the alert than to the crew of the vessel placed at risk. *ibid*.

22. The regulations of the Trinity House require a strict construction in favor of their application. *ibid*.

23. Having a light on board in such case is an indispensable precaution. *ibid*.

24. In a cause of collision where the loss was charged to be owing to negligence, malice, or want of skill, the Court, with the assistance of a captain of the Royal Navy, being of the opinion that the damage was occasioned by accident, chiefly imputable to the imprudence of the injured vessel, and not to the misconduct of the other vessel, dismissed the owners of the latter vessel, with costs. *The Leonidas*, 1 Stuart, 226.

25. The general rule of navigation is, when a ship is in stays, or in the act of going about, as she becomes for the time unmanageable, it is the duty of the ship that is near her to give her sufficient room. *ibid*.

26. But when a ship goes about very near to another, and without giving any preparatory indication from which that other can, under the circumstances, be warned in time to make the necessary preparations for giving room, the damage consequent upon want of sufficient room may arise from the fault of those in charge of the ship going about at an improper time or place. *ibid*.

27. Or in the case of darkness, fog, or other circumstances rendering it impossible for the ships to see each other so distinctly as to watch each other's evolutions, the fault may be with neither. *ibid*.

28. If it be practicable for a vessel which is following close upon the track of another to pursue a course which is safe, and she adopts one which is perilous, then, if mischief ensue, she is answerable for all consequences. *The John Munn, ibid*, 265.

29. In a cause of collision between two steam vessels, the Court, assisted by a captain of the Royal Navy, pronounced for damages and costs, holding that the one which crossed the course of the other was to blame. *The By-town, ibid*, 278.

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30. Where it appeared that the collision was the effect of mere accident, or that overriding necessity which the law designates by the term *vis major*, action dismissed, with costs. *The Sarah Ann*, 1 Stuart, 294.

31. In order to support an action for damages in a case of collision, it is necessary distinctly to prove that the collision arose from the fault of the persons on board of the vessel charged as the wrong-doers; or from the fault of the persons on board of that vessel, and of those on board of the injured vessel. *ibid.*

32. Where both parties are mutually blamable in not taking measures to prevent accidents, the rule is to apportion equally the damages between the parties according to maritime law as administered in the Admiralty Court. *ibid.*

33. Two steamers were going from Montreal to Quebec, and when opposite the city of Quebec, the one took the course usual on such occasions, and passed down below the lowermost wharf at the mouth of the river St. Charles, when she turned to stem the tide and come to the wharf at which she was to land her passengers; and the other did not descend so low, but made a short and unusual turn, with the intention of passing across the course of the former, and ahead of her after she had turned and was coming against the tide. *Held*: That the collision complained of resulted from a rash and hazardous attempt on the part of those on board of the steamer which made such short and unusual turn to cross the course of the other, contrary to the usual practice and custom of the river, and the rules of good seamanship, for the purpose of being earlier at her wharf. *The Crescent; The Rowland Hill, ibid.*, 289.

34. Manœuvres of this dangerous kind, which might, in a crowded port like that of Quebec, result in the most serious loss of property and of life, ought to be discountenanced. *ibid.*

35. In this case the objectionable manœuvre appeared to have proceeded from a spirit of eager competition and from miscalculation, and not from any attempt to injure the competing vessel. *ibid.*

36. The settled nautical rule is, that if two sailing vessels, both upon a wind, are so approaching each other, the one on the star-board and the other on the port tack, as that there will be a danger of collision if each continue her course, it is the duty of the vessel on the port tack immediately to give way, and the vessel on the star-board is to bear away so early and effectually as to prevent all

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chance of a collision occurring. *The Roslin Castle; The Glencairn*, 1 Stuart, 303.

37. The Court pronounced for damages against a vessel sailing down the river St. Lawrence, on her homeward voyage to Liverpool, running foul of another coming up in tow of a steamer, the night at the time being reasonably clear, and sufficiently so for lights to be seen at a moderate distance. *The Niagara; The Elizabeth*, *ibid*, 308.

38. There is no rule of law preventing vessels from entering or leaving the harbor of Quebec at any hour, or obliging them to keep any particular track or part of the channel in so doing. *ibid*.

39. On this occasion the outgoing vessel had the wind large, and as steamers are to be considered in the light of vessels navigating with a fair wind, the steamer and the outgoing vessel were considered in this respect as on an equality. *ibid*.

40. Vessels in tow, with a head wind and no sails, and fast to the steamer, so that she could only sheer to a certain distance on either side of the course in which she was towed by the steamer, is powerless to a very great extent. *ibid*.

41. The general rule is, that when two vessels are approaching each other, both having the wind large, and are approaching each other, so that if each continued her course there would be danger of collision, each shall port helm, so as to leave the other on the starboard hand in passing. *ibid*.

42. But it is not necessary that, because two vessels are proceeding in opposite directions, there being plenty of room, the one vessel should cross the course of the other in order to pass her on the starboard. *ibid*.

43. If a vessel take every precaution against approaching danger, it is not sufficient to subject her to damage for injury to another by collision, that in the moment of danger those on board such vessel did not use every means that might appear proper to a cool spectator, there must be gross negligence. *ibid*.

44. If the collision arose solely from the misconduct of those on board the steam-tug, both the other vessels are exempt from responsibility, and the action on the part of each must be dismissed, leaving them to their recourse against the steamer. *ibid*.

45. The law in such case is, that the tow is not responsible for an accident arising from the mistake or misconduct of the tug. *ibid*.

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46. Upon points submitted for the professional opinion of assessors, their opinion should be as definite as in a complicated case of this nature it is possible it should be. *ibid.*

47. In certain cases the Court will direct the questions to be reconsidered, and more definitely answered. *ibid.*

48. If there was no proper and sufficient lookout, and if the proper means were not adopted for avoiding collision after the time when the other vessel's lights were seen, her having taken the most seamanlike and proper course when the collision was all but inevitable, does not exempt a vessel from liability. *ibid.*

49. Although there may be a rule of the sea, yet one who has the management of a ship is not allowed to follow that rule to the injury of the vessel of another, when he could avoid the injury by pursuing a different course. *ibid.*

50. The harbor master has authority to station all ships or vessels which come to the harbor of Quebec, or haul into any wharf within the same, and to regulate the mooring and fastening, and shifting and removal of such ships or vessels.

The New York Packet, ibid, 325.

51. Where berths had been assigned or confirmed by the harbor master to several vessels in a dock in Quebec harbor, and the harbor master expressly directed the vessel proceeded against to remain in the position she then occupied for the night, warning the master at the same time of the damage which would be incurred if he attempted to haul further in, because there was not room enough in the dock; and the master hauled his vessel forward, and as the water fell in the dock, and the space between the wharves at the water level diminished, the vessels became tightly jammed together, so that it was impossible to move them; and as the water continued to fall the pressure became so great that one of the other vessels was completely crushed, and another was suspended between the crushed vessel and the wharf, and thrown nearly on her beam ends, thereby receiving great damage, the owner of the vessel so contravening the harbor master's orders, condemned in damages and costs. *ibid.*

52. By the Merchant Shipping Act (17 & 18 Vict., c. 104, ss. 296, 297) and the Steam Navigation Act (14 & 15 Vict. c. 79), as well as by the rule of the Trinity House of Quebec, when a steamer meets a sailing vessel going free, and there is danger of collision, it

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is the duty of each vessel to put her helm to port and pass to the right, unless the circumstances are such as to render the following of the rule impracticable or dangerous. *The Inga*, 1 Stuart, 335.

53. No sufficient excuse being found for not following this rule, a sailing vessel condemned in damages and costs for putting her helm to starboard, and passing to the left of a steam tow-boat, thereby causing collision with the vessel in tow, the steamer and her tow coming down the channel, nearly or exactly upon a line with the course of the sailing vessel. *ibid.*

54. See as to conflict of English and American law, how to steer. *ibid.*

55. As to liability of steamboat for collision between vessels, one of which is towed by the steamboat. *The John Counter*, 1 Stuart, 344.

56. Cases may occur in which an accident may arise from the fault of the tow, without any error or mismanagement on the part of the tug, and in such case the tow alone must be answerable for the consequences. *ibid.*

57. Cases may also occur in which both are in fault, and in such cases both vessels would be liable to the injured vessel, whatever might be their responsibility *inter se*. *ibid.*

58. The Court will not enter into the discussion as to the precise point, whether on the starboard side or otherwise, in which one vessel lies to the other at the time of being discovered. *ibid.*

59. Where two ships, close hauled, on opposite tacks, meet, and there would be danger of collision if each continued her course, the one on the port tack shall give way, and the other shall hold her course. *The Mary Bannatyne*, 1 Stuart, 350.

60. But she is not to do this if, by so doing, she would cause unnecessary risk to the other. *ibid.*

61. Neither is the other bound to obey the rule if, by so doing, she would run into unavoidable or imminent danger; but if there be no such danger, the one on the starboard tack is entitled to the benefit of the rule. *ibid.*

62. The circumstances of the case examined, and no sufficient excuse being found for not following the rule, the vessel inflicting the injury condemned in damages and costs. *ibid.*

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63. The Court of Vice-Admiralty exercises jurisdiction in the case of a vessel injured by collision in the river St. Lawrence, near the city of Quebec. *The Camillus*, 1 Stuart, 383.

(Doubts which had arisen on this head removed by 2 Wm. 4, c. 51, s. 6.)

64. The non-compliance by a vessel with the Trinity House regulations, as to the exhibition of lights, will not prevent the owners from recovering damages for injuries received from another vessel by collision, if the officers of the latter vessel saw the former, and knew her position. *The Martha Sophia*, 2 Stuart, 14.

65. Where a collision occurs, without blame being imputable to either party, loss must be borne by the party on whom it happens to alight. *The Margaret*, *ibid*, 19.

66. Where the evidence on both sides is conflicting and nicely balanced, the Court will be guided by the probabilities of the respective cases which are set up. *The Ailsa*, *ibid*, 38.

67. Where damage is occasioned by unavoidable accident, arising from foggy weather, the loss must be sustained by the party on whom it has fallen. *The Anne Johanne*, *ibid*, 43.

68. The law imposes upon a vessel, having the wind free, the obligation of taking proper measures to get out of the way. *ibid*.

69. Where a collision occurs between two sailing vessels from the non-observance of the rule respecting lights, the owner of the vessel by which such rule has been infringed, cannot recover for any damage sustained in the collision. *The Aurora*, *ibid*, 52.

70. Between a British vessel and a foreign ship within Canadian waters, the duty and the right of the parties are to be determined by the Act regulating the navigation of such waters. *ibid*.

71. For a collision occasioned by the mismanagement of a pilot taken on board and placed in charge of a ship, in conformity with the requirements of the law (enforced by a penalty), the vessel is not liable. *The Lotus*, *ibid*, 58.

72. When a vessel is lying at anchor, and another vessel is placed voluntarily, by those in charge, in such a position that danger will happen if some event arises, which is not improbable, those in charge of the second vessel must be answerable. *ibid*.

(Collision.)

73. Whenever two vessels are seen from each other, even in parallel courses, provided they are close to each other, or in any course so that there is reasonable probability of a collision, it is their duty, unless there be some impediment, to obey the rule prescribed by the Act respecting the navigation of Canadian waters. *The Arabian* and *The Alma*, 2 Stuart, 72.

74. Where a steamer, coming down the St. Lawrence, upon a dark night, meets a sailing vessel, and those in charge of the steamer are in doubt what course the sailing vessel is upon, it is their duty to ease her engine and slacken her speed until they ascertain the course of the sailing vessel. *ibid.*

75. The rule of the Admiralty Court, that in case of mutual blame the damage was to be divided, is superseded by sec. 12 of the "Act respecting the navigation of Canadian waters," and the penalty on a party neglecting the rules, enjoined by sec. 8, is to prevent the owner of one vessel recovering damages from the other also in fault. *ibid.*

This has since been changed by R. S. C. c. 79, s. 7.

76. A steamer going up the St. Lawrence at night, on a voyage from Quebec to Montreal, saw the light of another steamer coming down the river, distant about two miles; and when at the distance of rather more than half a mile, took a diagonal course across the river in order to gain the south channel, starboarding her helm, and then putting it hard-a-starboard. The steamer coming down, having ported her helm on seeing the other, a collision ensued. *Held*: That the vessels were meeting each other within the meaning of the Act regulating the navigation of the waters of Canada, and that the steamer going up the river was solely to blame for the collision in not having ported her helm. *The James McKenzie*, *ibid.*, 87.

77. A vessel having the wind free is bound to take proper means to get out of the way of a vessel close hauled. *The Courier*, *ibid.*, 91.

78. The owners of a vessel having a branch pilot on board are only exempt from liability for damage where the damage is caused exclusively by the negligence or unskilfulness of the pilot. *ibid.*

See *The Gordon*, *ibid.*, 198.

79. Of two vessels beating to the windward on opposite tacks, it is the duty of the vessel on the starboard tack to keep her course, and of the vessel on the port tack to give way. *The Liberty*, *ibid.*, 102.

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80. It is not enough to show that the accident could not be prevented by the party at the moment it occurred, if previous measures could have been adopted to render the occurrence of it less probable. *The Liberty*, 2 Stuart, 102.

81. Collision by two vessels while sailing, one on the starboard tack, close to the wind, and the other on the port tack. *Held*: That the latter was to blame for not porting her helm in time, and that the former complied with the rule of the road by keeping on a wind close hauled. *The Tornado*, 2 Stuart, 172.

82. The pilot in charge of a ship is solely responsible for getting her under weigh in improper circumstances. Defence in a cause of damage upon this ground sustained in the case of a vessel leaving the port of Quebec and running foul of another ship. *The Anglo-Saxon*, *ibid*, 117.

83. Where there is a reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it falls. *The Rockaway*, *ibid*, 129.

84. Where the damage was attributable to a deficiency of look-out and management on board the ship doing the damage, and not solely to fault or neglect on the pilot's part, the owners were held liable for the damage. *The Secret*, *ibid*, 133.

See *The Courier*, *ibid*, 91; and *The Gordon*, *ibid*, 198.

85. A vessel while at anchor in the harbor of Quebec, having been run into and made to start from her anchorage, and to drift down with the tide against other vessels, dismissed upon the ground of inevitable accident. *The McLeod*, *ibid*, 140.

86. A vessel in motion is bound to steer clear of a vessel at anchor, and nothing can excuse her not doing so but inevitable accident. *The Oriental*, *ibid*, 144.

87. When a collision was occasioned by improper steering of a vessel, the exclusive act of the pilot, the vessel was held entitled to the exemption provided by the statute. *The Hibernian*, *ibid*, 148.

88. A vessel held to be in fault for having ported her helm and thereby caused damage which might have been avoided if she had kept her course or starboarded. *The Lorne*, *ibid*, 177.

89. When a steamer at anchor showed a green and white light instead of a white light, as directed for steamers at anchor, she was held to have been in fault. *ibid*.

(Collision.)

90. The fault of one vessel will not excuse any want of care, diligence, or skill in another, so as to exempt her from sharing the loss or damage. *The Germany*; *The City of Quebec*, 2 Stuart, 158.

91. When both ships were in fault the Admiralty law divided the damages of the owners of the ships. *ibid.*

92. But this rule was qualified by the Act respecting the navigation of Canadian waters, which agrees with sec. 298 of the Merchant Shipping Act. *ibid.*

But since changed by R. S. C. c. 79, s. 7 (43 Vict. c. 29, s. 8.)

93. In "The Merchant Shipping Act Amendment Act" (25 & 26 Vict. c. 63, s. 29), this clause was repealed, and the old rule of dividing the damage was re-established. The rule and the penalty provided for the breach of them in Canadian waters remained unchanged until 43 Vict. c. 29, s. 8, so that now the rule of dividing the damages also obtains in Canada.

See note to *The Grace*, ante, p. 24.

94. The enactment in "The Merchant Shipping Act Amendment Act, 1862," to the effect that if in any case of collision it appeared to the Court that such collision was occasioned by the neglect of any regulation under that Act, the ship so neglecting should be deemed to be in fault is so far changed that if in any case of collision it is proved to the Court that the regulations under "The Merchant Shipping Acts, 1854 to 1873," have been infringed, the ship by which these regulations were so infringed shall be deemed to be in fault. See 36 & 37 Vict. c. 85, s. 17; 2 Stuart, 329; also ante, p. 24.

See 31 Vict. c. 58, s. 11 (Can.).

95. The Court of Vice-Admiralty exercises jurisdiction in a case of collision in Halifax harbor. *The Wavelet*, 2 Stuart, 354; s. c. Young, 34.

96. In order to support an action for damages in cases of collision, it is necessary distinctly to prove that the collision arose from the fault of the persons on board the vessel charged as the wrong-doer; or from the fault of the persons on board of that vessel and of those on board of the injured vessel. *The Agda*, Cook, 1.

97. Where the evidence on both sides is conflicting, and there is reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen. *ibid.*

(Collision.)

98. Where a part of the line of an electro-magnetic telegraph passed under the river St. Lawrence, being laid in such a manner on the bed as not injuriously to interrupt the navigation. *Held*, in a case of gross negligence, on the part of a sailing ship causing the wire cable to be broken, that her owners were liable for the damage; and, as under existing statutory law, the Admiralty has jurisdiction, in case of damage done by any ship, that consequently proceedings *in rem* against the offending vessel were rightly taken. *The Czar*, Cook, 9.

99. Where a steamship did not keep out of the way of a sailing ship, there being risk of a collision, and the sailing ship, by porting her helm instead of keeping her course, contributed to the collision, both held to be in fault, and neither entitled to recover. *The Quebec*; *The Charles Chaloner*, Cook, 17.

100. The law imposing compulsory pilotage having been repealed, the liability of shipowners for acts of pilots in charge of their vessels revived. *ibid*.

101. A steamer having a clear course altered it to go to the south and pass between two other vessels, and in attempting to do so collided with both. The fact of one of such vessels having very improperly altered her helm, and contributed materially to the collision, does not relieve the steamer from the liability to make good the injuries sustained by the vessel which did not contribute to the accident. *The Quebec*, Cook, 32.

102. Where one steamship overtook another in a shallow channel in the river St. Lawrence, and a collision ensued, the overtaking vessel declared to be in fault. *The Quebec*, Cook, 37.

103. Collision by two vessels while sailing close to the wind on opposite tacks. By the rule of the road the ship on the starboard tack was entitled to keep her luff. *Held*, in the Vice-Admiralty Court, that she was, notwithstanding in a case of imminent danger, and on being apprised that the port-tacked vessel was not under command, bound to give way, and for not doing so condemned in damages and costs. *The Underwriter*; *The Lake St. Clair*, Cook, 43.

104. *Held*, on appeal by the Judicial Committee of the Privy Council, that when a port-tacked vessel has thrown herself into stays, and becomes helpless, she ought, nevertheless, to execute any practical manœuvre in order to get out of the way of the starboard-tacked vessel. *ibid*.

(Collision.)

105. A starboard-tacked vessel, when apprised of the helpless condition of a vessel, which, by the ordinary rule of navigation, ought to get out of her way, is bound to execute any practical manœuvre which would tend to avoid the collision. *ibid.*

106. Both vessels held to blame for the collision, and the damages ordered to be assessed according to the Admiralty rule. *ibid.*

107. In such a case each party must bear their own costs, both in the Court below and in appeal. *ibid.*

108. To support a plea of inevitable accident the burden of proof rests upon the party pleading it, and he must show, before he can derive any benefit from it, that the damage was caused immediately by the irresistible force of the winds and waves; that it was not preceded by any fault, act, or omission on his part, as the principal or indirect cause; and that no effort to counteract the influence of the force was wanting. *The Agamemnon*, Cook, 60.

109. Where a barque and a steamer were proceeding in opposite directions, and the latter, when between a quarter and half a mile of the former, which was then keeping her course, ported her helm without slackening her speed, which brought her across the course of the barque, the helm of which was shortly afterwards starboarded, and a collision occurred. *Held*, That the action of the steamer in porting her helm, having brought the barque (which otherwise should have kept her course) into instant and most imminent danger, she was justified in starboarding; and the steamer, whose duty, when proceeding in a direction involving risk of collision, was to keep out of the way, and, moreover, to stop and reverse when danger was imminent, was responsible for the collision. *The N. Churchill*; *The Normanton*, Cook, 65.

110. The payment of sums of money to witnesses, considerably larger than those legally allowable to them, even when shown to have been made with no wrong intent, but from an unfounded apprehension that they would leave the country before testifying, will bring such discredit on their testimony as seriously to affect its credibility. *ibid.*

111. A ship sailing seven knots an hour in a fog over fishing ground on the banks of Newfoundland, without adequate means on deck to prevent accident. *Held*, to have been in fault, and a plea of inevitable accident overruled. *The Frank*, Cook, 81.

(Collision.)

112. Where the blasts of a fog-horn on an American schooner were substituted for the ringing a bell, as required by the sailing regulations, a plea that it was done in accordance with a circular from the Secretary of the Treasury of the United States overruled. But the breach of the regulations not having contributed to the accident the schooner was relieved from liability. *The Frank, Cook*, 81.

113. An omission to ring a bell in a fog, covered where an anchor light was seen in time to avoid a collision. *ibid.*

114. Where two ships were each to blame for a collision in Canadian waters, an Act of the Parliament of Canada, which precludes either from recovering its damage. *Held*, to be operative, although the Admiralty rule which divides the loss prevails in England. *The Eliza Keith; The Langshaw, Cook*, 107.

It now prevails also in Canada.

115. In a case of collision, the fault being mutual, the Admiralty rule will apply, as between the owners of cargo and the delinquent ships, dividing the loss, each ship being answerable for a moiety. *ibid.*

116. An ocean steamship approaching a narrow channel in the St. Lawrence, bound upwards, having another steamship ahead entering the channel. *Held*, to blame, under the sailing rules, for not stopping at the foot of the channel to let the descending vessel pass; for not porting her helm in time when in the channel; and for not slackening her speed and reversing in time. *The Elphinstone, Cook*, 132.

117. A custom involving the stoppage of an ascending vessel at certain difficult parts of the channel, noticed and approved. *ibid.*

118. Where an American sailing vessel was damaged by a collision with a British steamer in South American waters, and the latter released by a British gunboat from the jurisdiction of a South American tribunal and followed into Canadian waters, a plea of a defective green light overruled, and suits of owners of sailing vessel and cargo maintained. *The Enmore; The Belle Hooper, Cook*, 139.

119. Where an affidavit was obtained, before suit brought, from a pilot derogatory to his conduct in the management of a vessel, and furnished to the adverse interest, in a case of collision, to serve as evidence, the same was struck from the record. *ibid.*

(Collision.)

120. A steamship, ascending the river, before entering a narrow and difficult channel, observed a tug approaching with a train of vessels behind her, did not stop or slacken speed, and subsequently collided with the tug and her tow. *Held*, That the steamer was to blame for not stopping before entering the channel, in accordance with an alleged and established custom to that effect; and that having taken upon herself the responsibility of disregarding this custom, she was liable for the consequences of a sheer, which threw her across the fairway, and into collision with the descending vessels. *The Earl of Lonsdale*, Cook, 153.

121. The burden of proof was upon her to show that the collisions were not caused by her neglect; and, she having failed to do so, her owners were liable. *ibid.*

122. *Held*, in the same case, by the Judicial Committee of the Privy Council, on appeal, that, under the circumstances, the fact of the tug not having ported until immediately before the collision, did not amount to contributory negligence on her part, and that the decree of the Vice-Admiralty Court should be affirmed on all points. *ibid.*

123. A tug was seen, from a barque at anchor, to cross her bow, and so suddenly to stop her speed as to allow her tow to drift upon and collide with the barque; an action by the barque against the tow, the cause of neglect in the tug not being proved, was dismissed. *The Commodore*, Cook, 167.

124. If a tug, for a stipulated price, promises to tow a vessel from one place to another, her engagement is that she will employ competent skill, with a crew and equipment reasonably adequate to the object, without a warranty of success under every difficulty. *The William*, Cook, 171.

125. Where a tug deviated from an order of her tow, and afterwards proved so deficient in skill as to allow the tug to collide with another vessel. *Held*, That the tug was liable for the consequences of the collision. *ibid.*

126. A steamship, on a very dark night, overtook and sank a schooner. *Held*, That the schooner was not to blame for not showing a stern light, and that the steamship was in fault for not keeping out of the way. *The Cybele*, Cook, 190.

127. *Quære* as to change of sailing regulations in the matter of a stern light. *ibid.*

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128. The maritime law recognizes no fixed rate of speed for vessels sailing through fog. *The Attila*, Cook, 196.

129. Where a vessel is in a fog she should be under sufficient command to avoid all reasonable chance of collision. *ibid.*

130. Where a collision occurred in a fog between two sailing vessels, one lying to and the other running free, and the fog was so dense that their lights, respectively, could be seen but within from fifteen to twenty seconds before collision. *Held*, That the speed of the vessel running free was too great. *ibid.*

131. The Court will not receive as evidence depositions of persons professing to be skilled in nautical affairs as to their opinion in any case. *ibid.*

132. Where, from a steamship ascending the Traverse, below Quebec, a red and then a green light, indicating the approach of a sailing vessel, were seen and lost sight of, until too late to avoid a collision. *Held*, That the steamship was in fault for an insufficient lookout and too much speed, and that she was liable for the subsequent damage sustained by the injured vessel, unless upon the reference gross negligence or want of skill on her part was established. *The Govino*, Cook, 203.

133. The Court will rigidly apply the rule requiring the injuring vessel to stay by and assist the injured vessel, if the occasion should so require. *ibid.*

134. In the case of a steam vessel lying at anchor in fog upon an anchorage ground, while using her bell and showing two white lights, one upon her foremast and the other at the gaff aft, each in an oblong lantern. *Held*, That a sailing vessel, which, misled by the whistle of another steamer in motion, struck her, was in fault for going too fast; and that the lights of the steam vessel, though not in globular lanterns, as directed by the Act respecting the navigation of Canadian waters, being equal in power, were a substantial compliance with its provisions. *The General Birch; The Progress*, Cook, 240.

135. Where two vessels sailing, one on the starboard and the other on the port tack, came into collision, the latter held to be in fault for not keeping out of the way. *The Princess Royal; The Rubens*, Cook, 247.

136. Where two steam-tugs were, from a distance, approaching each other nearly end on, one light and the other with a train of

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booms in tow, and the former inclined from her course upon her starboard helm, and afterwards crossed upon a hard-a-port helm and struck the tug having the tow. *Held*, That she was in fault, and that the tug with the tow was not to blame for starboarding at the moment of collision and for not reversing. *The Margaret M.*, Cook, 270.

137. A plea of irresistible accident was overruled, on the ground that the vessel proceeded against had attempted to bring up in bad weather, in an improper position, and unprovided with the equipment necessary to enable her to do so in safety. *The Ida*, Cook, 275.

138. Where a steam vessel overtook and collided with a barque in a very dense fog. *Held*, That her speed, between seven and eight knots, was, under the circumstances, excessive, and that she was, therefore, to blame; and that the steamer not having become visible from the barque until within a distance of one hundred and twenty feet, or thereabouts, although her whistle had been heard for some time, the barque's people were not in fault in failing to show a stern light, as prescribed in the sailing regulations. *The European*, Cook, 286.

139. The rule as to when a stern light is to be exhibited explained. *ibid.*

140. Where a steamship, in a narrow channel in Lake St. Peter, was in the act of overtaking a steam-tug and tow so carelessly navigated as to create risk of collision, and one of the vessels in tow collided with her. *Held*, That the steamship was in fault for not keeping out of the way; the tow for not keeping her course. *The Lombard*; *The Farewell*, Cook, 289.

141. In cases of mutual fault, the ancient Admiralty rule, as to the division of the damages between the offenders, now prevails in Canadian waters, since the passing of the Act 43 Vict. c. 29, which restores the old law. *ibid.*

142. And in such cases each party must pay his own costs. *ibid.*

143. Where a sailing vessel and a steamship were meeting nearly end on, and the former ported, while the latter starboarded. *Held*, That the former was in fault for not keeping her course, and the latter for not stopping or slackening her speed. *The Bothal*; *The Nelson*, Cook, 296.

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144. A sailing vessel deviated from her course, contrary to the sailing rules, and came into collision with a steamer which might have otherwise avoided her, each held to be in fault, and the damages divided. *The Monica*, Cook, 314.

145. Where a steamer is charged with having omitted to do something which ought to have been done, proof of three things is required: first, that it was clearly in the power of the steamer to have done the thing charged to have been omitted; secondly, that if done, it would in all probability have prevented the collision; and thirdly, that it was such an act as would have occurred to any officer of competent skill and experience in command of the steamer. *ibid.*

146. Where two ships in the harbor of Quebec, from the violence of the wind and force of the tide, were accidentally brought into such proximity that each had a foul berth, both held to be in fault for not adopting the proper course to relieve themselves from their perilous positions, and thereby avoid a collision. *The Arran*, Cook, 353.

147. A vessel under charter was injured by a collision, caused by another vessel, that charter-party providing that, in case of damage, the hiring should cease until she could be repaired. *Held*, That an action by the charterers against the offending ship for the detention would lie. *The Nettlesworth*, Cook, 363.

148. Two vessels crossing, one on the starboard and the other on the port tack. *Held*, That the latter did not keep a proper lookout, and that the former did not keep her course, but ported her helm too late to avoid a collision, and that there was mutual fault. *The Signe; The Rose C.*, Cook, 366.

149. While two vessels, the *Wavelet* and the *Dundee*, were attempting to pass one another in Halifax harbor, they came into collision under circumstances for which the former alone was accountable, and she was, therefore, held liable in damages. *The Wavelet*, Young, 34.

150. The fact that the *Wavelet* at the time of the collision was in charge of a pilot held no ground for exemption from liability, pilotage not being compulsory under the Provincial statute. *ibid.*

151. In the last named case the collision took place in Halifax harbor, and therefore within the body of the county of Halifax.

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The defendant put in an absolute appearance without protest or declinatory plea, but the question as to the jurisdiction of the Court was raised by him at the hearing. *Held*, That under the statutes 24 Vict. c. 10, and 26 Vict. c. 24, the Court had full jurisdiction in the matter. *The Wavelet*, Young, 34.

152. The *We're Here* came to an anchor in Halifax harbor on the night of November 5th, using only one anchor. On the 6th the *Ben Nevis* anchored beside her, and, as it was alleged, in too close proximity. On the morning of the 7th both vessels were apparently securely moored, and the master of the former went on shore, leaving six men on board. In the course of the morning a gale sprung up, and the *We're Here*, not being adequately moored, collided with the *Ben Nevis*. The men on board the former vessel did not act as experienced seamen should have done under the circumstances, and her master made no attempt to get on board, while no negligence or want of skill or seamanship was proved against the *Ben Nevis*. *Held*, That judgment should be entered for the *Ben Nevis* for damages and costs.

Strictures made on evidence received in the Admiralty Courts. *The We're Here*, Young, 138.

153. The French barque *Clementine*, on her way to Halifax, collided with and sank an American fishing schooner on St. George's Bank. The collision occurred soon after sunrise, and there was conflicting evidence as to the state of the weather, the plaintiffs alleging that it was clear; the defendants that there were fog and mist. A sufficient lookout had been maintained on board the barque until within a few minutes before the collision, when the man on the lookout was called down to assist in working the vessel, and before he had returned to his post the schooner was struck. *Held*, That the barque was in fault; that a sufficient lookout should have been maintained throughout, and that she was therefore liable in damages and costs. *The Clementine*, Young, 186.

154. The question of jurisdiction having been raised in the last case, on the ground that both vessels were foreign, *Held*, The Court had full jurisdiction. *ibid.*

155. The steamer *M. A. Starr*, while proceeding down Halifax harbor, collided with the schooner *Edith Wier*. The schooner was lying at a wharf in such a position that her bowsprit and jibboom projected some twenty-five feet beyond the end of the wharf, there-

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by violating the harbor regulations. The collision would probably not have occurred but for another schooner which had been lying outside the *Edith Wier*, and which, just previous to the collision, had broken ground, and this narrowed the channel down which the steamer had to pass. *Held*, That as the *Edith Wier's* position was contrary to the harbor regulations, she should be liable for all damage to the steamer with costs of suit.

The rule as to inevitable accident stated. *The Edith Wier*, Young, 237.

156. The schooner *Hero*, drifting down Halifax harbor with the tide, bound for a port along the coast, all sails set, and regulation lights duly burning, was run into by the steamer *Alhambra*, which had just entered the harbor. The night was fine and clear, and the harbor perfectly calm. The steamer was going at a good speed, and had altered her course a few minutes before the collision to avoid a schooner becalmed near by the *Hero*. The lookout on board the steamer did not perceive the *Hero* till too late. *Held*, That although it was one of those cases in which the two colliding vessels occupied such relative positions that the lights of the schooner could not be seen by the steamer, yet the speed of the steamer being too great, and her look-out defective, in that the schooner was not noticed in time, the steamer was held liable in damages. *The Alhambra*, Young, 249.

157. Two vessels, the *Elba* and *Genoa*, approaching the harbor of New York, collided at an early hour in the morning, about twelve miles from shore. Both had their lights burning brightly, and were visible to each other. The *Elba* was seriously damaged, but succeeded in reaching New York, where she was owned. The *Genoa* was only slightly injured, and, instead of continuing her voyage, turned about and made for Halifax, where she was proceeded against by the owners of the *Elba*. The evidence was very voluminous and contradictory, but the preponderance went to show the *Elba* was blameless. *Held*, The *Genoa* liable for damages and costs. *The Genoa*, Young, 275.

158. The passenger steamer *S.*, sailing up the river St. John, met the steam-tug *N.* coming down, near Akerley's Point, where the river is about half a mile wide. The *S.* was near the western shore, which was on her port side going up; the *N.* about one hundred and fifty yards from the same side of the river. The *S.*, by keeping

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her course when she first sighted the N., might have avoided the collision, but instead ported her helm, which gave her a diagonal course to starboard towards the east side, and as a result struck the N. on the starboard quarter, and sank her. *Held*, That the S. was to blame, and liable for the damages sustained; also held that when two vessels are meeting end on, or nearly so, the rule to port helm may be departed from, where there are reasonable grounds for believing such course is necessary for safety, and consequently the N. was not to blame, immediately before the collision, for putting her helm to starboard. *The Soulanges; The Neptune*, Stockton, 1.

159. Two vessels, the R. and the G., were sailing up the river from St. John to Fredericton. At Perley's Reach, so called, near Fredericton, where the river runs about north-west and south-east, and is about three hundred yards wide, the R. being on the starboard side of the river, and on her starboard tack, the G. on the port side of the river, and on her port tack, the vessels were passing each other port side to port side. When the G. was nearly abreast the R. she suddenly rounded to, and struck the R. on the port side forward of the main chains, when the R. immediately sank. *Held*, That it was not a case of inevitable accident; that the R. being on the starboard tack, had the right of way; that the G. was to blame for the collision, and was liable for damages. *The Grace*, Stockton, 10.

160. A railway passenger car, standing upon a track on a wharf on the western side of the harbor of St. John, and within the limits of the city of St. John, was injured by a hawser attached and belonging to a steamship moored to the wharf. *Held*, That since the passing of the statute 26 & 27 Vict. c. 24, s. 10, the Vice-Admiralty Court has jurisdiction to entertain a claim for damage to property done by any ship, although the property injured is within the limits of a county, and situate upon the land. *The Teddington*, Stockton, 45.

See also judgment of Palmer, J., in this case on application for prohibition. *ibid*, 54.

161. The A. and the B. came into collision on the high seas. The B. was close-hauled on her starboard tack, the A. on her port tack, running free. It was not shown that the lights of the B. were so placed as to be fairly visible to the A. Both vessels kept their courses, and the collision took place. *Held*, notwithstanding the lights of the B. were not fairly visible to the A., it was the duty of

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the latter to keep clear and give way, and not doing so, she was liable for the damages. *The Arklow*, Stockton, 66.

162. The last case was reversed on appeal to the Judicial Committee (9 App. Cas. 136), the Court holding where there has been a departure from an important rule of navigation, if the absence of due observance of the rule can by any possibility have contributed to the accident, then the party in default cannot be excused.

Where the lights of the complaining vessel were not properly burning, and were not visible on board the other vessel. *Held*, That in the absence of proof that this latter was also to blame, the suit must be dismissed. *The Arklow*, Stockton, 72; s. c. 9 App. Cas. 136.

163. The tug G. was proceeding up the river St. John, and the tug V. coming down; when near Swift Point they came into collision, and the V. sank. The G., at the time of the accident, was, contrary to the rules of navigation, near the westerly shore on the port side of the vessel; the V. did not exhibit any masthead white light, as required by the regulations. *Held*, That both vessels were to blame; that the collision was occasioned partly by the omission of the V. to exhibit her masthead white light, but principally by the course of the G., and a moiety of the damages was given to the V. with costs. *The General*, Stockton, 86.

See *Salvage*, 54.

164. The vessel M. G., under command of a pilot, was entering the Miramichi, and near the Horse Shoe Bar, in the lower part of Bay du Vin, came into collision with a lightship there placed for the safety of navigation. *Held*, That under the evidence no fault was attributable to the M. G.; that it was a case of inevitable accident, and the suit was dismissed, but without costs, as the Crown was the promovent, and no costs can be given against the Crown. *The Minnie Gordon*, Stockton, 95.

165. The M., close-hauled on the port tack, heading about southwest by west, and going about three knots an hour, with the wind south, came into collision with the M. P., heading east, and running free about ten knots an hour, and was totally lost. *Held*, from the evidence, that the M. P. had no proper lookout; that failure to have a proper lookout contributed to the collision, and she was accordingly condemned in damages and costs. *The Maud Pye*, Stockton, 101.

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166. The V., stone laden, on a voyage from Dorchester to New York, off Tynemouth Creek, in the Bay of Fundy, close-hauled on the starboard tack, came into collision with the E. K. S., running free, in ballast, going up the Bay to Moncton. The night was dark and foggy, and from the evidence it appears that the V. had no mechanical fog-horn, as required by the regulations, and that the one she had was not heard on board the E. K. S., which was to windward. *Held*, That it was a case of inevitable accident; that the E. K. S. was not to blame, and the action was dismissed without costs to either party.

It is a rule of the Admiralty that where there is a material variance between the allegations of the libel and the evidence, the party so alleging is not entitled to recover, although not in fault, and fault is established against the other vessel. *The Emma K. Smalley*, Stockton, 106.

167. A tug-boat was engaged by the charterers of a vessel, the E., to tow her from the harbor of St. John, N. B., through the Falls at the mouth of the river, beneath a suspension bridge which spans the Falls at the point where the river flows into the harbor. The vessel towed was chartered to carry a cargo of ice from the loading place above the Falls to New York, and the charterers were to employ the tug and pay for the towage services. The tug, having waited to take another vessel in tow, together with the E., was too late in the tide, and in going under the bridge the topmast of the E. came into collision with the bridge and was damaged. *Held*, That the Court had jurisdiction to entertain the suit; that the delay of the tug in going through the Falls was evidence of negligence; and the tug and owners were condemned in damages and costs. *The Maggie M.*, Stockton, 185.

168. Two vessels—the M. P. and the P.—came into collision in the Bay of Fundy, whereby the former was badly damaged. The wind at the time was blowing strong from south south-east. The M. P. was hove to on the port tack, under a reefed mainsail; and the P. was close-hauled on the starboard tack. The weather at the time was foggy. The M. P. did not have a regulation fog-horn on board, but had a tin one blown by the mouth. When the P. was first seen by the M. P. she was from a quarter to a half mile distant. The M. P. was loaded with piling, bound for New York. The P. did not change her course, and ran into the M. P. and caused the injury. *Held*, That although the M. P. was on her port tack, she

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was practically hove to, and could execute no manœuvre to avoid the collision; that the absence of a regulation fog-horn on board did not occasion or contribute to the collision; but that the collision was occasioned by the want of a proper lookout on board the P., and she was therefore condemned in damages and costs. *The Paramatta*, Stockton, 192.

169. Two steamers of considerable length and draught, the one entering and the other leaving the port of N., signalled to each other that they both proposed to take the same channel, which, though short, was narrow and tortuous. The one steamer being fully committed to the channel, it was, under Art. 18 of R. S. C. c. 79, the duty of the other steamer to remain completely outside until the first had passed completely through.

(2) Where a collision appears possible, but as yet easily avoidable, neither vessel has a right to adopt manœuvres which place the other vessel in a position of unnecessary embarrassment or difficulty. The wrong-doer is solely responsible for damages from a consequent collision. *The City of Puebla*, 3 E. C. R. 26.

170. Two steamers were approaching each other near a public harbor in a dense fog, those in charge having mutually learned their approximate whereabouts by an interchange of blast signals. Notwithstanding such proximity, and the fact that the courses they were steering were such as would have brought them across each other's bows, one of them maintained a speed of from three to four miles an hour, and was running with a tide, at flood force, of one and a half knots per hour; the other was steaming at a speed of about three knots an hour, and no effort was made to alter her course. A collision occurred. *Held*, That both vessels had infringed the provisions of Arts. 13 and 18 of the Imperial Regulations for preventing collisions at sea, and were, therefore, mutually to blame for the collision.

(2) The word "moderate" in Art. 13 is a relative term, and its construction must depend upon the circumstances of the particular case. The object of this article is not merely that vessels should go at a speed which will lessen the violence of a collision, but also that they should go at a speed which will give as much time as possible for avoiding a collision when another ship suddenly comes into view at a short distance. It is a general principle that speed such that another vessel cannot be avoided after she is seen, is unlawful. (*The Zadok*, 9 P. D. 114, referred to.)

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(3) The owner of a ship wrongfully injured in a collision is entitled to have her fully and completely repaired, and if a ship is totally lost the owner is entitled to recover her market value at the time of the collision.

(4) Where both ships are at fault, the law apportions the loss by obliging each wrong-doer to pay one-half the loss of the other. (The provisions of sec. 12 of R. S. C. c. 79, limiting the liability of the party at fault in a collision to a sum of \$38.92 for each ton of gross tonnage, was applied to this case.) *The Heather Belle*; *The Fastnet*, 3 E. C. R. 40.

171. Under the provisions of section 10 of the Navigation Act (R. S. C. c. 79), where a collision occurs, the ship neglecting to assist is to be deemed to blame for the collision in the absence of a reasonable excuse.

Two steamships, the C. and the J., were leaving port together in broad daylight, and a collision occurred between them. The J. received such injury as to be rendered helpless. The C. did not assist, or offer to assist, the disabled ship, but proceeded on her voyage. The excuse put forward by the master of the C. was that the J. did not whistle for assistance, although the evidence showed that he must have been aware of the serious character of the damage sustained by her. He further attempted to justify his failure to assist by the fact that other ships were not far off; but it was shown that these ships were at anchor and idle. *Held*, That the circumstances disclosed no reasonable excuse for failure to assist on the part of the C., and that the consequences of the collision were due to her fault. *Held*, also, That the C. was in fault under Art. 16 of sec. 2 of the Navigation Act, for not keeping out of the way of the J., the latter being on the starboard side of the C. while they were crossing. *The Cutch*, 3 E. C. R. 362.

172. The steamship S. was proceeding up the harbor of Sydney, C. B., at a rate of speed of about eight or nine miles an hour. When entering a channel of the harbor, which was about a mile in width, her steam steering gear became disabled, and she collided with the J., a sailing vessel lying at anchor in the roadstead, damaging the latter seriously. It was shown that the master of the S. had not acted as promptly as he might have done in taking steps to avoid the collision when it appeared likely to happen. *Held*, That even if the breaking of the steering gear—the proximate cause of the collision—was an inevitable accident, the rate of speed at which

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the S. was being propelled while passing a vessel at anchor in a roadstead such as this was excessive, and that, in view of this and the further fact that the master of the S. was not prompt in taking measures to avert a collision when he became aware of the accident to his steering gear, the S. was in fault and liable under Article 18 of sec. 2 of R. S. C., c. 79. *Held*, also, That the provisions of Art. 21 of sec. 2 of R. S. C., c. 79, should be applied to roadsteads of this character, and that, inasmuch as the S. did not keep to that side of the fair-way in mid-channel which lay on her starboard side, she was at fault under this Article, and responsible for the collision which occurred. *The Santanderino*, 3 E. C. R. 378.

173. During the early hours of the morning of August 12th, 1891, a collision occurred between the plaintiffs' vessel lying moored to a dock in Windsor, Ont., and a barge in tow of a tug. The defendants in their pleadings admitted the collision, but claimed that the plaintiffs' vessel was in fault, since there was no light on board and no stern-line out, in consequence of which latter neglect she swung out into the stream as the tug and its tow were passing at a reasonable distance away from her, and that the collision was occasioned thereby.

(1) Upon the question as to whom should begin, *Held*, That the defendants having admitted that their vessels were moving and the plaintiffs' vessel was at rest, and that a collision had occurred, they must begin on the question of liability for the accident, with a right to reply on the question of the amount of damage, if it were necessary to go into that question. *Held*, also, That it was necessary for the defendants to establish such negligence against the plaintiffs as would contribute to the accident, and that as it was about daylight at the time of its occurrence, and the plaintiffs' vessel was admittedly seen by the tug when more than one hundred feet distant, the tow being at that time three hundred feet behind the tug; and further, since the evidence showed that the plaintiffs' vessel was properly and securely moored to the dock, the absence of light did not constitute such negligence on the part of the plaintiffs as contributed to the accident. They were, therefore, entitled to recover for the damage arising from the negligent navigation of the tug and her tow, to the amount of the actual cost of the repairs and also the cost of towage to the ship-yard.

(2) A survey of the damage done to their vessel was made at the plaintiffs' instance. Notice of intention to have a survey made was

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only given to one of the defendants, and that by mailing a letter to his address on the day before the survey was made. Notice of the result of the survey was given to the defendants. *Held*, That the cost of the survey was not chargeable to the defendants, because reasonable notice was not given to enable them to be present or to be represented thereat. *Held*, also, That demurrage should not be allowed, inasmuch as the vessel was lying idle at the time of the collision, and that as soon as the plaintiffs obtained a commission for her the vessel went to work, although repairs were not then completed, no loss of earnings occurring by reason of the accident. *Charlton et al. v. The Colorado and Byron Trerice*, 3 E. C. R. 263.

COMMISSIONS.

1. Commission of Vice-Admiral in and over the Province of Quebec, under the Great Seal of the High Court of Admiralty of England, dated March 19, 1764. 1 Stuart, 370.

2. Commission of Judge of Vice-Admiralty Court of the Province of Lower Canada, under the Great Seal of the High Court of Admiralty of England, dated October 27, 1838. 1 Stuart, 376.

3. Commission under the Great Seal of the United Kingdom of Great Britain and Ireland, for the trial of offences committed within the Admiralty jurisdiction, dated October 30, 1841. 1 Stuart, 380.

For a history of the Commission from the Lord High Admiral to the Vice-Admiral, see *The Little Joe*, Stewart, 394.

—of unlivery—the Court appoints the place. *La Merced*, Stewart, 219.

COMPULSORY PILOTAGE.

1. For a collision occasioned by the mismanagement of a pilot, taken on board and placed in charge of a ship in conformity with the requirements of the law, enforced by a penalty, the vessel is not liable. *The Lotus*, 2 Stuart, 58.

2. The owners of a vessel having a branch pilot on board are only exempt from liability for damage where the damage is caused exclusively by the negligence or unskilfulness of the pilot. *The Courier*, *ibid*, 91.

3. For damages done by a collision in the harbor of Quebec, occasioned by the default, negligence, or unskilfulness of a branch pilot, the owners are not responsible. *The Anglo-Saxon*, *ibid*, 117.

But see subsequent enactment in "The Pilotage Act, 1873," of Canada (now R. S. C. c. 80).

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4. In Nova Scotia there is no compulsory pilotage in the English sense of the term. Hence, there being a direct privity between the pilot and the ship, the latter is liable in Admiralty for damage caused by his acts. *The Wavelet*, Young, 34; s. c. 2 Stuart, 354.

5. The rule of the English Admiralty regulating the employment of pilots has never been adopted or applied under the laws of the United States. *The China*, 2 Stuart, 231.

6. Exemption from liability is not taken away from the owners, though the master has the power of selection from amongst a number of pilots. *The Hibernian*, *ibid*, 148.

7. When an ocean steamer descending the river St. Lawrence, opposite a buoy designating a bend in the channel for her to turn, instead of doing so, crosses over and sunk a barge in tow of a steamer on the opposite side, *Held*, That the tug steamer and her tow were not to blame, by reason of an alleged custom for ascending vessels to stop below the buoy for descending vessels to pass it first; and that if there were such a custom, it would afford no excuse for a descending steamer coming into collision if she could have avoided it. But it appearing that the cause of collision was exclusively the act of the pilot of the ocean steamer, exemption of liability granted to the owner. *The Thames*, *ibid*, 222.

8. No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any place where the employment of such pilot is compulsory by law. See 388th section of "The Merchant Shipping Act, 1854," and the 14th section of 31 Vict., c. 58 (Can.). A change was made by sec. 56 of "The Pilotage Act, 1873," which enacts "that after its commencement no owner or master of any ship shall, in any case, be compelled to employ or to give his ship into the charge of a pilot, notwithstanding any Act making the employment of a pilot compulsory." Sec. 92 of this Act repeals sec. 14 of 31 Vict. c. 58. The employment of a pilot is not now compulsory. "The Pilotage Act," R. S. C., c. 80, sec. 57.

9. Circumstances under which owners, who have taken a pilot on board under compulsion of law, are not allowed to throw the responsibility of an accident upon him. *The Agda*, Cook, 7.

10. Compulsory pilotage done away with in Canadian waters by the Canadian Act. "The Pilotage Act, 1873," see No. 8. *The Quebec*, *ibid*, 31.

(Compulsory Pilotage.)

11. The fact that the vessel to blame, in a case of collision occurring within Halifax harbor, was at the time of the accident in charge of a pilot, *Held*, no ground of exemption from liability, pilotage not being compulsory under the statutes of Nova Scotia. *The Wavelet*, Young, 34.

See *Conflicting Decisions*, 2.

CONFLICTING DECISIONS.

1. Conflicting decisions of Dr. Lushington in the case of *The City of London*, and of Sprague, J., in the case of *The Ospray*. *The Inga*, 1 Stuart, 335.

2. Decisions with respect to the liability of the owner of a vessel for damage done by her while in charge of a pilot, given before the passing of the Act of the Canadian Legislature (12 Vict. c. 114, s. 5), are not applicable under the law as it stood, after having been subjected to the important changes made by that Act. *The Lotus*, 2 Stuart, 58.

CONTEMPT.

1. Commitment for. *The Enoch Stanwood*, Stewart, 123.

CONTRABAND.

1. On the outward voyage—under false papers—condemnation. *The Aramintha*, Stewart, 47; *The United States*, *ibid*, 116; *The Happy Couple*, *ibid*, 65; *The Success*, *ibid*, 77.

2. Copper in pigs, going to a port of naval equipment, is. *The Express*, *ibid*, 292.

3. Unmanufactured copper, going to a port of naval equipment, is. *The Euphemia*, *ibid*, 563. See also *The Jerusalem*, *ibid*, 570.

4. Iron, under Swedish treaty, not. *The Active*, *ibid*, 579.

CONVENTION OF 1818.

1. The construction of the Articles of the Treaty. *The J. H. Nickerson*, Young, 100.

2. For a contrary decision to the above, see *The White Fawn*, Stockton, 200.

See note to latter case at p. 204.

CONGRESS.

See *Acts of Congress*.

CONSIDERATION.

See *Mariners' Contracts*.

CONSULATE DEL MARE.

The 148th and 149th capitoli of the *Consulate del Mare* declare that the sale of the ship, or the change of the master, operate as a discharge of the seaman. *The Scotia*, 1 Stuart, 166.

See *Sale of Ship; Owners*.

CONSULS.

1. In a suit by American seamen for wages, the consul of the United States, upon receiving notice of suit, made a representation in writing, accompanied by accounts, showing the promoters to be in debt to the ship, and requested that the case should not be entertained. *Held*, That the jurisdiction of the Admiralty over causes of wages of foreign seamen being discretionary, the Court would, under the circumstances, decline to proceed with the action. *The Bridgewater*, Cook, 257.

2. In a suit for seaman's wages the protest of a foreign consul to the jurisdiction overruled. *The Monark*, Cook, 341.

See *Foreign Vessels; Wages*, 35.

CONSTRUCTION.

See *Mariners' Contract*.

CONTRACT.

See *Salvage; Mariners' Contract*.

COSTS.

1. The Court may exercise a legal discretion as to costs. Costs refused in this case. *The Agnes*, 1 Stuart, 57.

2. If a suit be brought by a seaman for wages, a settlement without the concurrence of the promoter's proctor does not bar the claim for costs; the Court will inquire whether the arrangement was or was not honorable and just, and relieve the proctor if it were not so. *The Thetis*, *ibid*, 363.

3. The practice is not to give costs to either party where a collision has occurred from inevitable accident. *The Margaret*, 2 Stuart, 19.

See *The Anne Johanne*, *ibid*, 43; *The McLeod*, *ibid*, 140; *The Harold Harfaager*, *ibid*, 208.

(Costs.)

4. Nor, where the damages have been found to proceed from the fault of the pilot alone. *The Lotus*, 2 Stuart, 58.

See *The Thames*, *ibid*, 222.

5. Costs are not usually decreed in Courts of Admiralty against seamen who are unsuccessful in their suits. A decree for costs would, in most cases, subject the seaman to imprisonment, without being productive of any real advantage to the other party. *The Washington Irving*, *ibid*, 97.

6. A party who does not accept a tender made in current bank notes, or a cheque on a bank, drawn by a merchant of established credit, exposes himself to the payment of costs to the adverse party. *The British Lion*, *ibid*, 114.

See *Tender*.

7. Where evidence was nearly balanced and suit dismissed, no costs were allowed. *The Ailsa*, *ibid*, 38.

8. In collision suits, either where there are cross-cases, or where one suit alone is brought, by the practice of the Admiralty, when mutual fault is established and the damages are divided, each party must bear his own costs. *The Farewell*; *The Lombard*, Cook, 289.

But see *The General*, Stockton, 86.

9. This rule is also enforced by the Judicial Committee of the Privy Council even where a party, condemned as being wholly in fault in the Court below, succeeds so far in appeal as to have the fault declared mutual and the damage divided. *The Underwriter*; *The Lake St. Clair*, Cook, 43, s. c. 36 L. T. N. S. 155; 2 App. Cas. 389.

10. When, on a reference, the promoter's claim is reduced by one-third or more, by the practice of the Court, he must pay all costs of the reference. *The Barcelona*, Cook, 311.

11. Costs are not given against the Crown. *The Minnie Gordon* Stockton, 95.

See *Foreign Enlistment Act*, 5.

12. Where seamen might have sued for and recovered their wages before a stipendiary magistrate or two justices, their costs refused. *The Ann*, Young, 104.

See *ante*, p. 435, rules 132-138, as to costs.

See *Security for Costs. ante*, p. 128.

DIGEST.

(Costs.)

13. Captors are not liable for costs and damages for firing at a vessel which had shown a hostile appearance of resistance. *The Friends Adventure*, Stewart, 97.

See *Inevitable Accident*, 4.

COURTS.

For the jurisdiction of Courts of Admiralty, see *Admiralty Jurisdiction*, *Customs*, *Cross Causes*, *Droits of Admiralty*, *Jurisdiction*, *Vice-Admiralty Court*, *Revenue*.

CRIMES AND MISDEMEANORS.

12 & 13 Vict. c. 96, makes provision for the prosecution and trial in Her Majesty's colonies of offences committed within the jurisdiction of the Admiralty.

See also 18 & 19 Vict. c. 91, s. 21.

See *Commissions*, 3; *Offences*.

CROSS CAUSES.

If a cause of damage by collision be instituted in any Vice-Admiralty Court, and the defendant institutes a cross cause in respect of the same collision, the Judge may, on application of either party, direct both causes to be heard at the same time and on the same evidence; and if the ship of the defendant in one of the causes has been arrested, or security given by him to answer judgment, but the ship of the defendant in the other cause cannot be arrested, and security has not been given to answer judgment therein, the Court may, if it thinks fit, suspend the proceedings in the former cause until security has been given to answer judgment in the latter cause. 26 Vict. c. 24, s. 21; 2 Stuart, p. 257.

See *ante*, p. 419, rule 27, as to Counter Claims.

CUSTOM.

1. A custom involving the stoppage of an ascending vessel at certain difficult parts of the channel noticed and approved. *The Elphinstone*, Cook, 132.

2. A steamer held to blame for not stopping before entering an intricate channel to allow a descending vessel to pass, in accordance with an alleged and established custom to that effect. *The Earl of Lonsdale*, *ibid*, 153.

CUSTOMS.

See *Revenue Cases*.

DAMAGE—DIVISION OF.

1. Where both parties are mutually blamable in not taking measures to prevent accidents, the rule is to apportion equally the damages between the parties according to the maritime law as administered in the Admiralty Court. *The Sarah Ann*, 1 Stuart, 300.

2. Where, in cases of collision, both parties are mutually blamable, Courts of Admiralty, adhering to the ancient maritime law, would have apportioned the damages equally between the respective owners of the vessels; but by the Act of Canada, 31 Vict. c. 58, owners of vessels contravening the rules prescribed in such statute are precluded from recovering any portion of their damages. *The Rosa*; *The Ranger*, Cook, 104. *The Eliza Keith*; *The Langshaw*, *ibid*, 113.

See 43 Vict. c. 29 (R. S. C. c. 79, s. 7), restoring the Admiralty rule.

3. The foregoing rule does not apply to owners of cargo laden on board one of the delinquent vessels. *ibid*, 116.

4. And now, by the Canadian statute 43 Vict. c. 29 (R. S. C. c. 79, s. 7), the Admiralty rule of the equal division of damages, in the event of common fault, is followed. *The Lombard*; *The Farewell*, Cook, 289.

See also *The Nelson*, *ibid*, 296; *The Monica*, *ibid*, 314; also note, Cook, p. 294.

5. By the modern practice of the Admiralty, where, in the case of collision, both ships are to blame, but no cross action is brought, the defendant is condemned in a moiety of the plaintiff's damages. *The Arran*, Cook, 356.

See *Collision*, 30, 57, 65, 75, 83, 91, 97, 101, 106, 114, 141, 144, 148, 163, 173.

See note to *The General*, Stockton, p. 91, where the cases are collected; *The Maud Pye*, *ibid*, p. 104.

DAMAGES—MEASURE OF.

1. A vessel collided with two lighters endeavoring to raise a sunken steam-tug, broke the chains which connected them with the wreck, sent them adrift, and was condemned in the damages resulting from such collision. On the reference, the registrar and merchants allowed the promoters all expenses incurred in endeavoring to raise the sunken tug for the four weeks preceding the

(*Damages—Measure of.*)

accident on proof only that the money had been duly expended. *The Celeste*, Cook, 76.

2. Upon objection the report was overruled, and it was held that it was necessary for the promoters to go further, and to establish not only the actual expenditure, but that such expenditure was adapted to the purpose for which it was made, and had enured so much to the benefit of the promoters. *ibid.*

3. When items in a claim are disputed the principles of evidence applicable in ordinary suits are to be followed. *ibid.*

4. The measure of damages for the detention of a vessel after a collision is the amount she can earn while unemployed by reason of the collision. *The Normanton*, Cook, 122.

See *The Nettlesworth*, *ibid.*, 363.

5. Where, after a collision, the vessel injured was docked for the winter, and the resuming of her voyage could not take place until spring, by reason of the navigation of the St. Lawrence being closed until then. *Held*, That her owners could not recover as part of their damages the seamen's wages while idle during the winter, and no more than would suffice to send them to the place where they were shipped, and to pay their wages until their arrival there. *ibid.*

6. The promoters having stated and proved their loss in the United States currency, the registrar and merchants reported an equivalent amount in gold, not at current rate of exchange, but at the rate as on the day of the collision. The Court, upon contestation, maintained the report. *The Frank*, Cook, 105.

7. Upon objection to a report of the registrar and merchants, to whom had been referred the amount of the damages sustained by a foreign shipowner, through the arrest, detention and search of his vessel, without reasonable cause, under the Foreign Enlistment Act, 1870; the report was confirmed, and held correct, in restricting the damages so occasioned to their natural and proximate consequences, and in disallowing remote and consequential loss. *The Atalaya*, *ibid.*, 260.

8. Upon the liquidation of an account by the registrar and merchants in a case of collision for damages to a wharf. *Held*, That a claim for consequential damages, not asked for in the libel, nor awarded by the decree, cannot be considered by the registrar and merchants; and that if it could, such damage should not be allowed either under Article 1660 of the Civil Code or by the Maritime Law. *The Barcelona*, Cook, 299.

(Damages—Measure of.)

9. But further held that the Vice-Admiralty Courts Act, 1863, conferring jurisdiction on Vice-Admiralty Courts, where damage was done by any ship, does not extend to consequential damages occasioned to the traffic of a lessee. *ibid*, p. 311.

10. On a bottomry bond, interest is allowed at the legal rate where principal money payable. *The Elysia A.*, Stockton, note, p. 42.

11. The owner of a ship wrongfully injured in collision is entitled to have her fully and completely repaired, and if the ship is totally lost the owner is entitled to recover her market value at the time of the collision. *The Heather Belle*, 3 E. C. R. 40.

See note to *The Maud Pye*, Stockton, p. 104.

DAMAGES TO PROPERTY.

1. Vice-Admiralty Courts have jurisdiction, in respect of claims, for damage done by any ship (26 Vict. c. 24, s. 10), as in case of damage to a wharf in Halifax harbor. *The Chase*, 2 Stuart, 361 ; s. c. Young, 113.

2. A railway passenger car, standing upon a track on a wharf on the western side of the harbor of St. John, and within the limits of the city of St. John, was injured by a hawser attached and belonging to a steamship moored to the wharf. *Held*, That since the passing of the statute 26 & 27 Vict. c. 24, s. 10, the Vice-Admiralty Court has jurisdiction to entertain a claim for damage to property done by any ship, although the property injured is within the limits of a county, and situate upon the land. *The Teddington*, Stockton, 45.

3. Where a part of the line of an electro-magnetic telegraph passed under the river St. Lawrence, being laid in such a manner on the bed as not injuriously to interrupt the navigation. *Held*, (1) In a cause of gross negligence on the part of a sailing ship, causing a wire cable to be broken, that her owners were liable for the damage ; (2) Under existing statutory law, the Admiralty has jurisdiction, in case of damage done by any ship, and that consequently proceedings *in rem* against the offending vessel were rightly taken. *The Czar*, Cook, 9.

4. A tug-boat was engaged by the charterers of a vessel, the E., to tow her from the harbor of St. John, N. B., through the Falls at the mouth of the river, beneath a suspension bridge which spans the Falls at the point where the river flows into the harbor. The vessel

(Damages to Property.)

towed was chartered to carry a cargo of ice from the loading place above the Falls to New York, and the charterers were to employ the tug and pay for the towage services. The tug, having waited to take another vessel in tow, together with the E., was too late in the tide, and in going under the bridge the topmast of the E. came into collision with the bridge and was damaged. *Held*, That the Court had jurisdiction to entertain the suit; that the delay of the tug in going through the Falls was evidence of negligence; and the tug and owners were condemned in damage and costs. *The Maggie M.*, Stockton, 185.

See *Jurisdiction*, 44, 45.

5. In a case of collision against a ship for running foul of a floating light-vessel, the Court pronounced for damages. In such case the presumption is gross negligence, or want of skill, and the burthen is cast on the shipmaster and owners to repel that presumption. *The Miramichi*, 1 Stuart, 237.

See *The Minnie Gordon*, Stockton, 95.

See also notes to *The Teddington*, *ibid*, at p. 52.

6. A claim for damages, upon loss of vessel by shipwreck after capture, rejected, there being no misconduct on part of the captors. *The Roscio*, Stewart, 556.

7. The Maritime Court of Ontario refused to exercise jurisdiction in a cause of damage to a tow, arising from the negligence of the towing vessel, where no actual collision had occurred between vessels. *The Sir S. L. Tilley*, 8 Can. L. T. 156.

This is not now the law. See *Jurisdiction*, 44.

Also see *ante*, p. 162.

8. The Court entertained jurisdiction in a case where a propeller broke a canal lock gate, in consequence of which land adjoining was flooded and injured. *The Walter S. Frost*, 5 Can. L. T. 471.

See *Jurisdiction*.

See *Admiralty Jurisdiction*.

DAMAGES (PERSONAL).

1. Damages awarded to a steward for assaults committed upon him by the master without cause. *The Sarah*, 1 Stuart, 89.

2. Unnecessary wanton and unlawful punishment cannot be inflicted under color of discipline. *ibid*.

(*Personal Damages.*)

3. The master is responsible for any abuse of his authority at sea. *The Friends*, 1 Stuart, 118.

4. A suit for personal damage by a cabin passenger against the master, for attempting to exclude him from the cabin, sustained. *The Toronto*, *ibid*, 170.

5. A suit for personal damages, by a seaman against the master, dismissed. *The Coldstream*, *ibid*, 386.

6. A suit by a seaman against the master and owner of a ship, for assault and battery and oppressive treatment dismissed on the ground of mutiny. *The Bridgewater*, Cook, 252.

7. A foreign steamship, the E., while in the harbor of St. John, N. B., loading a cargo of deals, bought and received on board a quantity of coals for the use of the ship. The coals were purchased to be delivered in the bunkers of the steamer, and the coal merchant employed a third party to put the coals on board. The steam power to hoist the coals on board was furnished by the E. The plaintiff was employed by the third party to put the coals on board, and while so employed was injured by the breaking of the hoisting rope. *Held*, That an action could not be maintained against the steamer; that the Court had no jurisdiction; and that the Vice-Admiralty Courts Act, 1863, s. 10, sub-sec. 6, did not confer authority to entertain such an action. *The Enrique*, Stockton, 157.

See note to this case at p. 161. In view of later decisions this case must be considered overruled.

DECLINATORY EXCEPTION.

1. In a suit for an injury done on the waters of the St. Lawrence, near the city of Quebec, a declinatory exception, in which it was averred that the *locus in quo* of the pretended injury was within the body of the county of Quebec, and solely cognizable in the Court of Queen's Bench for the district of Quebec, dismissed with costs; and decree pronounced maintaining the ancient jurisdiction of the Admiralty over the river St. Lawrence. *The Camillus*, 1 Stuart, 383.

See *Collision*, 63.

See *Pleading*.

DECREE.

See *Re-opening of Decree*.

Decrees of Berlin and Milan not revoked by the Duke of Condon's letter. *The New Orleans Packet*, Stewart, 260.

DEFAULTS.

1. On return of a warrant first default made, but no prayer for a second default at the expiration of two months from the return of the warrant, proceedings discontinued thereby. *The Friends*, 1 Stuart, 73.

DEFECTS.

In Vice-Admiralty Act pointed out. *The City of Petersburg*, Young, 12; 2 Stuart, 343.

DENMAN (LORD).

1. As respects the Act 6 & 7 Vict. c. 85, commonly called Lord Denman's Act, see *The Courier*, 2 Stuart, 91.

DEPUTY JUDGE.

See *Judge*.

DEPUTY REGISTRAR.

See *Registrar*.

DEPUTY MARSHAL.

See *Marshal*.

DERELICT.

1. In no case, however meritorious the service, does the High Court of Admiralty of England decree more than a moiety for salvage. *The Marie Victoria*, 2 Stuart, 109.

2. The rule as to salvage on derelict stated and cases reviewed. *The Ida Barton*, Young, 240.

3. Where no owner appeared to claim goods found derelict, and their value was not great, *Held*, That the salvors should have the full amount they realized after payment of necessary costs. *Two Bales of Cotton*, *ibid*, 135.

4. For directions as to proceedings in case of derelicts, see *The John*, *ibid*, 129.

5. The salvors of a derelict ship should, in the first instance, give notice to the proctor for the Admiralty, who will forthwith extract a warrant. After the issue of the derelict warrant, the salvors should move for leave to intervene. If the case be one of only trivial importance, the Court will then direct the filing of affidavits in proof of claims, etc. In cases of greater moment, it will sanction an act or petition with the usual pleadings and proof under the rules of 1859; and when there are claims represented by several

(Derelict.)

proctors, or subsequent to each other, a consolidation will be ordered, as in other cases of salvage. If a private warrant be extracted in the interim between giving notice to the Admiralty proctor and his taking proceedings, it will be disallowed on taxation. *The Sarah*, Young, 102.

Procedure is now according to the rules of 1893. *ante*, p. 413.

6. As to when desertion of vessel does not constitute her a derelict. *The Margaret*, Young, 171.

See *Salvage*.

DESERTION.

By the General Maritime Law, as well as by the Merchant Shipping Act, desertion from the ship in the course of the voyage is held to be a forfeiture of the antecedent wages earned by the party. *The Washington Irving*, 2 Stuart, 97.

See *Evidence*, 8.

DESTINATION.

Of vessel—Proof of. *The Nuestra Senora del Carmen*, Stewart, 83.

DESUETUDE.

The mode of abrogating or repealing statute law by desuetude, or non-user, is unknown in English law. *The Mary Campbell*, 1 Stuart, 223.

DETENTION.

Of seamen. See *Merchant Shipping Act*, 1873, s. 9.

See *Wages*, 7; *Damages—Measure of*, 4, 7, 9, 11.

DEVIATION.

To save life and property. *The Scotswood*, Young, p. 32.

To save property. *The Herman Ludwig*, *ibid*, p. 214.

See *Mariners' Contract*.

See *Salvage*.

DISCRETION.

As to what is understood by the term "discretion" which Courts are said to exercise. *The Agnes*, 1 Stuart, p. 57.

DISMISSAL OF MASTER.

1. The ship *Jean Anderson*, owned at Charlottetown, P. E. I., was sold by the agent of the owners at Liverpool, England, to the

(Dismissal of Master.)

claimant, who agreed to go out to Charlottetown, take charge of the vessel as master, and bring her to England for a certain monthly rate of wages. He accordingly came, and having been put in charge, proceeded in her to Pictou, N. S., where, on the 7th October, 1878, she was attached by the official assignee, the owners having become insolvent. The claimant remained on board, not being recognized by the assignee, yet not being dismissed until the 22nd of April following. On bringing suit for his wages up to that date, it was contended that the insolvency of the owners had *ipso facto* put an end to the functions of the master, and was equivalent to a dismissal. *Held*, That the master having been in legal possession of the ship, both as master and purchaser, and not having been dismissed by the assignee, was entitled to his wages to the full extent of his claim with costs of suit.

The Jean Anderson, Young, 244.

2. It appears that intemperance or immorality merely is not ground for dismissal of the master. *The Bella Mudge*, *ibid*, 222.

See *Master*.

DISRATING.

1. The power of the master to displace any of the officers of the ship is undoubted, but he must be prepared to show that he had lawful cause for so doing. *The Sarah*, 1 Stuart, 87.

2. The party discharged from his office is not bound to remain with the ship after her arrival at the first port of discharge. *ibid*.

DOMICIL.

1. A Frenchman, settled in America, returning to France upon information of war, goes back to America—American domicile not divested. *Les Trois Freres*, Stewart, 1.

2. Three years residence with an intended uncertain continuance, though for a special purpose, with trade independent of it, and continued after declaration of war, constitutes a domicile. *The Patriot*, *ibid*, 350.

DROITS OF ADMIRALTY.

1. The droits of the Admiralty are distinct from the King's rights—*jure coronæ*. *The Little Joe*, Stewart, 394.

3. As to the droits of the Crown taken before the order for reprisals.—October 13, 1812. Stewart, 417.

See *Prize*.

3. The Vice-Admiralty Courts have jurisdiction in all matters arising out of droits of Admiralty. 26 Vict. c. 24, s. 11.

ENEMY.

1. St. Domingo, though in possession of persons who renounced allegiance to France, the British government not having declared otherwise, still a colony of France. *The Happy Couple*, Stewart, 65.
2. As to frauds to conceal enemy's property. *The Venus*, *ibid*, 96.
3. Where the property of an enemy is under the King's protection, he may appear in a court of law to claim it. *The Dart*, *ibid*, 301.
4. Commanders may enter into contracts with subjects of the enemy, for the supply of their force, and grant passports to protect them in such transactions. *The Two Brothers*, *ibid*, 551.

ERROR.

Amendment in the warrant of attachment not allowed for an alleged error not apparent in the acts and proceedings in the suit. *The Aid*, 1 Stuart, 210.

EVIDENCE.

1. In a suit for wages, service and good conduct are to be presumed till disproved. *The Agnes*, 1 Stuart, 56.
See *The John Owen*, 5 Can. L. T. 565.
2. As to the evidence of the master and suits with seamen, or in a case of pilotage. *The Sophia*, *ibid*, 96.
The law of evidence has been changed so that all witnesses are now competent.
3. In a suit for personal damage brought by a passenger against the master of a vessel, the Court will look to the education and condition in life of the persons who give evidence, not only as entitling them to full credit for veracity, but also to greater accuracy of observation, and a greater sense of the proprieties of life. *The Toronto*, *ibid*, 179.
4. An agreement varying the contract of wages in the ship's articles cannot be proved by parol evidence. *The Sophia*, *ibid*, 219.
5. As to former incompetency of witnesses, see *The Mary Campbell*, *ibid*, 224.
6. More credit is to be given to the crew on the alert than to the crew of the vessel that is placed at rest. *The Dahlia*, *ibid*, 242.

(Evidence.)

7. In cases of collision it is necessary to prove fault on the part of the persons on board of the vessel charged as the wrong-doer; or fault of the persons on board of that vessel and of those on board of the injured vessel. *The Sarah Ann, ibid*, 300.

8. Entry of the desertion in the official log-book deemed sufficient proof, unless the seaman can show, to the satisfaction of the Court, that he had sufficient reason for leaving the ship. *The Washington Irving*, 2 Stuart, 97.

9. Witnesses, by reason of interest, are no longer incompetent to give evidence. The question as to their credibility is for the discretion of the Court. *The Courier, ibid*, 91.

10. Affirmative testimony is entitled to greater weight than negative. *The Anglo-Saxon, ibid*, 117.

11. Where an affidavit was obtained, before suit brought, from a pilot, imputing fault to himself in the management of a vessel under his control as such, and furnished by him to the adverse interest in a case of collision to serve as evidence, it was struck from the record. *The Enmore, Cook*, 139.

12. Obtaining certificates, statements, and especially affidavits, from persons on board an injured vessel, to avail as evidence against their own vessel, is viewed by the Court with strong disapprobation, and to be reprobated. *ibid*.

13. In causes of collision the Court will not receive as evidence the depositions of persons professing to be skilled in nautical affairs as to their opinions upon any stated case. *The Attila, Cook*, 199. See *Collision*, 131.

14. Nor in salvage cases will the Court be guided by the opinions of *soi-disant* skilled persons pronouncing upon the value of services on a hypothetical case, but will exercise its own judgment on a review of all the circumstances. *The Victory, ibid*, 337.

15. When items in a claim referred to the registrar are disputed, the principles of evidence applicable in ordinary suits come into play. *The Celeste, ibid*, 77.

16. Reasonable and probable cause involves the consideration of what the *facts* of a case are, and what are the reasonable deductions from these facts. *The Atalaya, ibid*, 234.

17. And these facts must be legally established—hearsay evidence is insufficient. *ibid*.

18. The evidence of respectable persons may be disproved by facts and stronger evidence. *The Herkimer, Stewart*, 22.

EXCEPTIVE ALLEGATION.

1. An allegation exceptive to the testimony of a witness on the ground that he did not believe in the being of a God, and a future state of rewards and punishments. *The By-town*, 1 Stuart, 280.
2. As to the competency of a witness, see *The Courier*, 2 Stuart, 91.

FEES.

1. All fees of office, properly so called, are presumed to have a legitimate foundation in some act of a competent authority, originally assigning a fair *quantum meruit* for the particular service. *The John and Mary*, 1 Stuart, 64.
2. Where the fee is established by or under the authority of an Act of Parliament, the statute is conclusive as the *quantum meruit*. *ibid.*
3. Where settled by the authority of the Court, the subject is not concluded thereby, but may try the reasonableness of the sum claimed as a *quantum meruit*, before a Court of competent jurisdiction, and obtain the verdict of a jury thereon, when, and when alone, they become established fees. *ibid.*
4. Since the passing of the Act of the Imperial Parliament, 2 Will. 4, c. 51, the establishment of fees in the Vice-Admiralty Court is exclusively in the King in Council; and the tables of fees established under the statute having been revoked without making another, it is not competent to the Court to award a *quantum meruit* to its officers. *ibid.*
5. The Order in Council of the 20th of November, 1835, passed to repeal the table of fees established under the authority of 2 Will. 4, c. 51: 1st. Had the effect of repealing the same; 2nd. Did not give force or validity to the table of fees of 1809; 3rd. Nor did it authorize the judge to grant fees as a *quantum meruit*. *The London*, 1 Stuart, 140.
6. By the ancient law of England, none, having any office concerning the administration of justice, shall take any fee or reward of any subject for the doing of his office. *ibid.*
7. All new offices erected with new fees, or old offices with new fees, are within the statute 4 Edw. 1, for that is a tallage upon the subject which cannot be done without common assent by an Act of Parliament. *ibid.*

(Fees.)

8. Officers concerned in the administration of justice cannot take any more for doing their office than has been allowed to them by Act of Parliament. *ibid.*

9. Or, by immemorial usage, referred to by Lord Coke, in this instance, as in so many others, considered as evidence of a statute, or other legal beginning of the fee. *ibid.*

10. These principles have at all times been recognized as fundamental principles of the law and constitution of England. *ibid.*

11. The Court disclaims all jurisdiction in the matter of fees. The registrar may, in his option, require them when the service is performed; or he may give credit, and then his recourse, if they are not paid, is in the ordinary courts of the country. *Ex parte Drolet*, 2 Stuart, 1.

12. In the High Court of Admiralty the fees of the judge and officers of the Court abolished and salaries substituted (3 & 4 Vict. c. 66), 2 Stuart, 241, but retained in the Vice-Admiralty Courts. The judge's fees abolished by the Admiralty Act, 1891.

13. For table of fees to be taken in Vice-Admiralty Courts by the officers and practitioners, established by Order in Council of 23rd August, 1883, under the authority of the Act 26 Vict. c. 24, s. 14, see Cook, p. 372.

14. For table of fees to be taken in the Admiralty Divisions of the Exchequer Court of Canada by the officers and practitioners, established by Order in Council of June 10th, 1893, see *ante*, p. 527.

FISHERY ACTS OF CANADA.

1. An American fishing schooner was seized by one of the cutters appointed by the government of Canada for the protection of their fisheries for being engaged in catching fish within the limits reserved by treaty and by the Dominion Fishery Acts. The evidence on the part of the prosecution was to the effect that, when boarded by the cutter, there were fish freshly caught upon the schooner's deck, and every indication of the crew having been very recently engaged in the management of their lines. The only evidence offered for the defence was that the fish had been caught merely for the purpose of food. *Held*, That the vessel should be forfeited, with all her tackle, stores and cargo. *The Wampatuck*, Young, 75.

(Fishery Acts of Canada.)

2. A case very similar to the preceding, the only difference being in the evidence adduced. For the prosecution it was proved that the vessel was lying to in the very position for fishing; that the crews were seen casting and hauling in their lines, and throwing out bait, and that when boarded there were several lines over the rail, fresh bait about the deck, and other signs of recent operations. *Held*, That there was sufficient evidence to warrant a forfeiture of the vessel. *The A. H. Wanson, ibid*, 83.

3. The vessel proceeded against in this case was found by one of the cutters in the midst of a mackerel fleet, within the prescribed limits, and overhauled, but afterwards permitted to go; but, on further information being received, was seized, on a subsequent day, in an adjoining port. The only material evidence against her was that of the crews of two other fishing schooners, who testified that they had seen lines and bait thrown out from the suspected vessel, and that her men had continued trying for mackerel until the cutter came up. This evidence was further strengthened by admissions of the men going to show that they had actually taken mackerel. *Held*, That the vessel was forfeited. *The A. J. Franklin, ibid*, 89.

4. The treaty by which the United States formally renounced the liberty they had hitherto enjoyed of fishing within the prescribed limit of three marine miles of any of the bays or harbors of His Britannic Majesty's dominions in America contained the following proviso: "Provided, however, that the American fishermen shall be permitted to enter such bays or harbors for the purpose of shelter, and repairing damages therein, and of purchasing wood and of obtaining water, and for no other purpose whatever." The *J. H. Nickerson* entered the bay of Ingonish, in Cape Breton, for the alleged purpose of obtaining water, etc.; but the evidence clearly showed that the real object of her entry was to obtain bait, and that a quantity of bait was so procured. She was seized by the government cutter, after she had been warned off, and while she was still at anchor within three marine miles of the shore. *Held*, That she was guilty of procuring bait, and preparing to fish within the prescribed limit, and must therefore be forfeited. *The J. H. Nickerson, ibid*, 96.

5. The following is a contrary decision. An American fishing vessel, the *W. F.*, in November, 1870, went into Head Harbor, a small bay on the eastern end of Campobello, in the Province of

(Fishery Acts of Canada.)

New Brunswick. While there the master purchased fresh herrings for bait for fishing purposes. The vessel was seized by the commander of a Dominion vessel engaged in the protection of Canadian fisheries on the ground of violation of the Imperial Statute 59 Geo. III. c. 38, and the Canadian Statutes 31 Vict. c. 61, and 33 Vict. c. 15. An application was made by the Crown, on the part of the Attorney General of Canada, for a monition calling upon the owners of the vessel to show cause why she should not be condemned as forfeited to the Crown for violation of the above mentioned laws. *Held*, That the purchase of bait was not a "preparing to fish" illegally in British waters; that the intention of the master, so far as appeared, may have been to prosecute his fishing outside the three mile limit; and that the Court would not impute fraud or an intention to infringe the law in the absence of evidence: the monition for condemnation was therefore refused. *The White Fawn*, Stockton, 200.

See note to this case. *ante*, p. 204.

6. A foreign fishing vessel illegally fishing in British waters within three miles of the coast of Canada, and not navigable according to the laws of the United Kingdom or of Canada, and not having a license to fish, contrary to the provisions of the Canadian Act of Parliament (31 Vict. c. 61, and 33 Vict. c. 15), declared to be forfeited. *The Samuel Gilbert*, 2 Stuart, 167.

7. A claim for a schooner, being a foreign vessel, and cargo, rejected, and forfeiture of them declared for fishing in Canadian waters contrary to the fishery laws. *The Franklin S. Schenck*, 2 Stuart, 169.

8. By sub-section 5 of section 1 of the Imperial Act, 54 & 55 Vict. c. 19 [The Seal Fishery (Behring's Sea) Act, 1891], it is enacted that "if a British ship is found within Behring's Sea, having on board thereof fishing or shooting implements, or seal skins or bodies of seals, it shall lie on the owner or master of such ship to prove that the ship was not used or employed in contravention of this Act." *Held*, That the words "used or employed" are not to be confined to the particular use and employment of the ship on the occasion of her seizure, but extend to the whole voyage which she is then prosecuting; and if the ship is found in the condition described in the said sub-section, she is liable to forfeiture unless the presumption therein raised can be rebutted by the owner or master. *The Oscar and Hattie*, 3 E. C. R. 241.

FLAG OF TRUCE.

1. A vessel captured in violation of a flag of truce ordered to be restored with full damages and costs. *The Zodiack*, Stewart, 333.

FLOATING LIGHT.

1. In a case of collision against a ship for running foul of a floating light-vessel, the Court pronounced for damages. *The Miramichi*, 1 Stuart, 237.

See note to *The Enrique*. *ante*, p. 161.

See *Collision* 164.

FLOGGING.

By an Act of Congress, passed September 28th, 1850, flogging in the navy of the United States of America, and on board vessels of commerce, was abolished from and after the passing of that Act. See 1 Stuart, p. 390.

FOG.

1. An omission to ring a bell in a fog, covered where an anchor light was seen in time to avoid a collision. *The Frank*, Cook, 81.

2. The maritime law recognizes no fixed rate of speed for vessels sailing through fog. *The Attila*, *ibid*, 196.

3. Vessels should, however, be under sufficient command to avoid all reasonable chance of disaster. *ibid*.

See Art. 12 of sailing rules. *ante*, p. 376.

4. See the case of *The General Birch*, Cook, 240.

See *Collision*, 27, 67, 111, 112, 128, 134, 138, 153.

FOG-HORN.

1. A Norwegian barque collided in a fog with an American schooner at anchor, on the banks of Newfoundland. A plea that the substitution of the blasts of a fog-horn for the ringing of a bell, as provided in the International Sailing Regulations, was done in accordance with instructions contained in a circular from the Secretary of the Treasury of the United States, overruled. *The Frank*, Cook, 81.

See note to *The Paramatta*, Stockton. *ante*, p. 199.

See *Collision*, 166, 168.

FOG SIGNALS.

1. Rules concerning fog signals issued in pursuance of "The Merchant Shipping Act Amendment Act, 1862," under an Order in Council dated January 9th, 1863. 2 Stuart, p. 301.

(Fog Signals.)

2. These rules were adopted in the Province of Canada by an Act of the Legislature passed June 30th, 1864 (27 & 28 Vict. c. 13, s. 2, Art. 10), and re-enacted by an Act of the Parliament of the Dominion of Canada, passed May 22nd, 1868 (31 Vict. c. 58). *ibid*, p. 315; *ante*, p. 372.

3. They have also been adopted in the United States of America by Act of Congress passed April 29th, 1864, c. 69. *ibid*, p. 308.

FOREIGN ENLISTMENT ACT.

1. Every ship or vessel fitted out or equipped in Her Majesty's dominions for warlike purposes against the dominions of a friendly state, without Her Majesty's license, with all the materials, ammunition and stores which may belong to or be on board of such ship, is liable to forfeiture under the provisions of "The Foreign Enlistment Act, 1870."

See *Vice-Admiralty Court*.

2. Upon the representations of the Consul-General of Spain for Canada, an American vessel was detained and her cargo taken out and searched, by virtue of a warrant under the hand of the Governor-General of Canada, upon a charge of having on board arms and munitions of war, destined for the use of Cuban insurgents, contrary to the provisions of the Foreign Enlistment Act, 1870. *Held*, That the charges against the vessel were not supported by facts sufficient to justify her arrest, detention and search, and her release ordered. *The Atalaya*, Cook, 215.

3. Hearsay evidence under the circumstances not admissible. *ibid*.

4. The owners declared entitled to an indemnity by the Commissioners of the Imperial Treasury, under the provisions of the statute. *ibid*.

5. Costs in this case were allowed against the Crown. *ibid*.
See *Costs*, 11.

6. Damages in respect of search and detention under the Act restricted to the natural and proximate consequences, and damages remote and consequential not allowed. *The Atalaya*, Cook, 260.

See *Damages*, 7.

FOREIGN SHIPS.

1. The ancient jurisdiction of the Admiralty restored by 3 & 4 Vict. c. 65, s. 6, with respect to claims of material men for necessities furnished to foreign ships. *The Mary Jane*, 1 Stuart, 271.

(*Foreign Ships.*)

2. The Admiralty has jurisdiction in cases of collision occurring on the high seas, when both vessels are the property of foreign owners. *The Anne Johanne*, 2 Stuart, 43.

3. By 26 Vict. c. 24, s. 10, the ancient jurisdiction restored to Vice-Admiralty Courts, with respect to claims of material men for necessities furnished to foreign ships. *ante*, p. 356.

4. The rules prescribed by the Act respecting the navigation of Canadian waters are operative upon foreign as well as British ships. 31 Vict. c. 58, s. 10, *ante*, p. 382. (R. S. C. c. 79.)

5. Where vessels are within British waters, a statute general in terms, and intended for the protection of navigation, would apply to foreigners, as in case of a statutory obligation to take pilots on board under certain circumstances.

See *The Milford*, Swa. p. 367.

6. The 189th sec. of the Merchants Shipping Act, 1854, applies to foreign as well as British vessels. *The Monark*, Cook, 345.

See *Wages*.

FOREIGN STATE.

See *Seamen*, 2.

FORFEITURES.

1. The Court of Vice-Admiralty in the colonies has concurrent jurisdiction with Courts of Record there in case of breach of any Act of the Imperial Parliament relating to the trade and revenues of the British possessions abroad.

See *Vice-Admiralty Court*, 5.

2. Also jurisdiction in case of forfeitures and penalties incurred by a breach of any Act of the Provincial Parliament relating to the customs as to trade and navigation.

See *Vice-Admiralty Court*, 6.

3. Under the Act regulating the trade of the British possessions abroad, no suit for the recovery of any penalty or forfeiture to be commenced except in the name of some superior officer of the Customs or Navy, or by His Majesty's Advocate or Attorney-General for the place where such suit shall be commenced. *The Dumfriesshire*, 1 Stuart, 245.

4. Vessels for warlike purposes, fitted out or equipped in Her Majesty's dominions, without Her Majesty's license, contrary to

(Forfeitures.)

"The Foreign Enlistment Act," to be prosecuted and condemned in the Court of Admiralty, and not in any other Court. "The Foreign Enlistment Act, 1870," s. 19. 2 Stuart, 291.

5. Under sec. 30 of said Act, Court of Admiralty shall mean the High Court of Admiralty of England or Ireland, the Court of Session of Scotland, or any Vice-Admiralty Court within Her Majesty's dominions. See 2 Stuart, 297.

6. Goods imported without paying duties required by law are liable to forfeiture. *The Queen v. Gold Watches*, Young, 179.

See *The Minnie*, Young, 65.

7. As to what will work a forfeiture of master's wages, see *The Alexander Williams*, *ibid*, 217.

See note to *The Mistletoe*, Stockton, *ante*, p. 127.

8. Misconduct on the part of salvors will work a forfeiture of right to salvage. *The Charles Forbes*, Young, 172.

See note to *The St. Cloud*, Stockton, *ante*, p. 153.

9. The Court has full jurisdiction to impose penalties for illegal distilling of spirits. *The Queen v. Flint*, Young, 280.

See *Penalties; Violation of Revenue Laws*.

FOUL BERTH.

1. If one vessel comes to an anchor, it is the duty of those in charge of any other vessel anchoring near her to do so in such a position as that the vessels may swing with the tide without risk of coming together. *The Rockaway*, 2 Stuart, 129.

See *Collision*, 51, 83, 146.

FURTHER PROOF.

1. Not allowed to a party who had been guilty of fraud and perjury in a recent case, extending to the present. *The Three Brothers*, Stewart, 99.

2. Not sufficient where it did not explain the whole transaction. *The Fly*, *ibid*, 171.

3. Not allowed unless some ground is laid for it in the original evidence. *The Johanna*, *ibid*, 521.

4. A cargo totally destitute of proof of property, and without any directions, not allowed to go to further proof. *The Active*, *ibid*, 579.

See *Proof*.

FREIGHT AND EXPENSES.

1. Some copper in bars was condemned as contraband, the ship and cargo belonging to other persons, were, however, restored. Freight and expenses were allowed to the neutral master. *The Jerusalem*, Stewart, 570.

GOVERNMENT OF QUEBEC.

Ancient limits of. See Proclamation of Geo. III. of date October 7, 1763, in 2 Stuart, p. 381.

GREENWICH HOSPITAL.

1. The provincial law of Nova Scotia for attaching the goods of absconding debtors, no excuse to prize agents for not paying unclaimed shares to Greenwich hospital. *The Bermuda*, Stewart, 231.

HABEAS CORPUS.

See *Piracy. The Chesapeake*, ante, p. 208.

HARBOR.

1. Personal torts committed in the harbor of Quebec are not within the jurisdiction of the Admiralty. *The Friends*, 1 Stuart, 112. See *Admiralty Jurisdiction*, 1.

2. Damages awarded in case of collision in the harbor of Quebec. *The Lord John Russell*, *ibid*, 190.

3. A vessel moored alongside of another at a wharf in the harbor of Quebec made responsible to the other for injuries resulting from her proximity. *The New York Packet*, *ibid*, 325.

4. A declinatory exception overruled in a suit for an injury done by collision in the harbor of Quebec. *The Camillus*, *ibid*, 383.

See *Declinatory Exception*.

See *Harbor Master*.

5. A vessel contravening the harbor regulations liable for damages arising from collision. *The Edith Wier*, Young, 237.

See *Collision*.

See *Inevitable Accident*.

HARBOR MASTER.

1. The rules of the Trinity House of Quebec empower the harbor master to station all ships or vessels which come to the harbor of

(Harbor Master.)

Quebec, or haul into any of the wharves within the limits of the same; and to regulate the mooring and fastening, and shifting and removal of such ships and vessels; and to determine how far and in what instances it is the duty of masters and other persons having charge of such ships or vessels to accommodate each other in their respective situations, and to determine all disputes which may arise concerning the premises. *The New York Packet*, 1 Stuart, 325.

2. Owners of vessel contravening harbor master's order condemned in damages for a collision. *ibid.*

HELM.

1. Time and opportunity must be allowed for reflection before porting helm to avoid a collision. *The Margaret*, 2 Stuart, 19.

HIGH COURT OF ADMIRALTY OF ENGLAND.

1. An Act to improve the practice and extend the jurisdiction of the High Court of Admiralty of England. 3 & 4 Vict. c. 65.

See *ante*, p. 314.

2. An Act to make provision for the judge, registrar and marshal of the High Court. 3 & 4 Vict. c. 66.

See 2 Stuart, p. 241.

3. The judge, under last named Act, not allowed to sit in House of Commons. *ibid.*

4. By the same Act, fees to judge, registrar and marshal abolished, and these officers remunerated by fixed salaries. *ibid.*

5. The High Court of Admiralty of England may revise the charges of the practitioners in any Vice-Admiralty Court. *ibid.*

See *Table of Fees*.

See rule 141 of 1893, giving review of taxation to the judge.

HIGH COURT OF ADMIRALTY IN IRELAND.

See *Ireland*.

HOME PORTS.

1. All the ports of the Dominion are home ports in relation to each other, so that a bottomry bond given on a Canadian vessel in a Canadian port cannot be enforced in the Vice-Admiralty Court. *The Three Sisters*, Young, 149; s. c. 2 Stuart, 370.

See *Nova Scotia*.

See rule 37, sub-sec. (b). *ante*, p. 420.

IMMORALITY OR INTEMPERANCE OF MASTER.

See *Master*. Also see *ante*, pp. 127, 134.

IMPERIAL PARLIAMENT.

See *Acts of Parliament*.

IMPORTATION.

What countries under the revenue laws. *The Minnie*, Young, 71.

INEVITABLE ACCIDENT.

1. Where a collision occurs without blame being imputable to either party, loss must be borne by the party on whom it happens to alight. *The Margaret*, 2 Stuart, 19.

2. Inevitable accident is that which the party charged with could not possibly prevent, by the exercise of ordinary care, caution, and maritime skill. *The McLeod*, *ibid*, 140.

3. As to what constitutes inevitable accident, and the rule as to the burden of proof, see *The Chase*, Young, at p. 118.

See *The Edith Wier*, *ibid*, 239.

4. The steamer *Richmond*, while seeking shelter from a violent storm, and using every possible precaution, unavoidably ran down and sank a small schooner, on an action for damages, *Held*, That judgment should be for defendant, each party paying his own costs. *The Richmond*, *ibid*, 164.

5. Where the defence is inevitable accident the plaintiff must begin. *The John Owen*, 5 Can. L. T. 565.

But see *contra*. *The Otter*, L. R. 4 A. & E. 203.

See *The Emma K. Smalley*, *ante*, p. 106, and *The Minnie Gordon*, *ante*, p. 95; also note to last case, *ante*, p. 98, for a citation of the English authorities.

See *Collision*, 108, 111, 137, 155, 164, 166.

INLAND NAVIGATION.

1. Regulations respecting collisions apply to ships of the United States. 2 Stuart, 312.

2. As to maritime commerce of Western Lakes not being inland navigation, see opinion Supreme Court of Michigan. *ibid*, 329.

See R. S. C. c. 74, *ante*, p. 361; R. S. C. c. 79, *ante*, p. 372.

See Preface to 2 Stuart.

INSCRUTABLE ACCIDENT.

1. In case of collision, where there is reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen. *The Rockaway*, 2 Stuart, 129.

See *Inevitable Accident*.

See *Collision*, 96.

INSOLVENCY OF OWNER.

1. The insolvency of the owners does not *ipso facto* put an end to the functions of the master. He must be dismissed by their assignee. *The Jean Anderson*, Young, 244.

See R. S. C. c. 74, s. 56, *ante*, p. 369.

See *Master*.

INTEMPERANCE.

See *Master*.

See *ante*, pp. 127, 134.

INTERPRETATION OF TERMS.

1. For interpretation of terms under the Colonial Laws Validity Act, 28 & 29 Vict. c. 63, see *ante*, p. 332.

2. For interpretation of terms under Vice-Admiralty Courts Act, 1868, 26 & 27 Vict. c. 24, see *ante*, p. 356.

3. Under R. S. C. c. 74, an Act respecting the Shipping of Seamen, see *ante*, p. 361.

4. Under R. S. C. c. 79, Navigation of Canadian Waters, see *ante*, p. 372.

5. Under 53 & 54 Vict. c. 27, the Colonial Courts of Admiralty Act, 1890, see *ante*, p. 395.

6. Under the General Rules and Orders of 1893, see *ante*, p. 413.

7. For interpretation of terms under the Vice-Admiralty Courts Act Amendment Act, 1867, 30 & 31 Vict. c. 45, see 2 Stuart, 259.

See *Forfeitures*, 5.

IRELAND.

1. An Act to extend the jurisdiction, alter and amend the procedure and practice, and to regulate the establishment of the Court of Admiralty in Ireland, 30 & 31 Vict. c. 114, see 2 Stuart, 261.

2. The judge of the Irish Court not to sit in Parliament or practice as an advocate or barrister. *ibid*, 263.

See *Jurisdiction*.

JOINT CAPTURE.

See *La Furieuse*, Stewart, 177.

JUDGE.

1. For commission of the Judge of Vice-Admiralty Court of Lower Canada, see 1 Stuart, 376.

2. List of Judges in Quebec since the cession of the country by the Crown of France to Great Britain. *ibid*, 391; Cook, 410.

3. The method of appointment of a Judge and other officers of the Vice-Admiralty Court was provided for by 26 Vict. c. 24. 2 Stuart, p. 254.

It is now governed by The Admiralty Act, 1891.

4. For commission of Judge of the Vice-Admiralty Court of Quebec, see 2 Stuart, 377.

See *Lord High Admiral*.

See *Kerr* (Judge).

JUDGMENT.

1. The merits of a judgment can never be overrated in an original suit, either at law or in equity. Till the judgment is set aside or reversed, it is conclusive, as to the subject matter of it, to all intents and purposes. *The Phæbe*, 1 Stuart, 63, n.

See *Moses v. Macferlan*, 2 Burr, 1005.

JUDICIAL COMMITTEE.

See *Privy Council*.

JURISDICTION.

1. The Court has no jurisdiction in a case of pilotage, where there has been a previous judgment of the Trinity House upon the same demand. *The Phæbe*, 1 Stuart, 59.

2. The jurisdiction of the Court in relation to claims for extra pilotage is not ousted by the Provincial statute, 45 Geo. III., c. 12, s. 12. *The Adventurer*, 1 Stuart, 101.

3. In case of wreck in the river St. Lawrence (Rimouski), the Court has jurisdiction of salvage. *The Royal William*, 1 Stuart, 107.

4. A great part of the powers given by the terms of the commission or patent of the Judge of the Admiralty is totally inoperative. *The Friends*, 1 Stuart, 112.

(Jurisdiction.)

5. The Court of Admiralty, except in prizes, exercises an original jurisdiction only on the grounds of authorized usage and established authority. *ibid.*

6. It has no jurisdiction *infra corpus comitatus*. *ibid.*

This is now changed by 3 & 4 Vict. c. 65 (1840).

See *ante*, p. 316.

7. The Admiralty jurisdiction as to torts depends upon locality, and is limited to torts committed on the high seas. *ibid.*

8. Torts committed in the harbor of Quebec are not within the Admiralty jurisdiction. *ibid.*

9. The Admiralty has jurisdiction of personal torts and wrongs committed on a passenger on the high seas by the master of the ship. *ibid.*, and *The Toronto*, 1 Stuart, 170.

10. Justices of the Peace cannot give themselves jurisdiction in a particular case, by finding that as a fact which is not a fact. *The Scotia*, 1 Stuart, 164.

See *Justices of Peace*.

11. The Court has no jurisdiction in a claim of property to an anchor, etc., found in the river St. Lawrence, in the district of Quebec. *The Romulus*, 1 Stuart, 208.

12. Collision between a steamboat and a bateau, both exclusively employed in the harbor of Quebec, not cognizable by this Court. *The Lady Aylmer*, 1 Stuart, 213.

This was prior to 3 & 4 Vict. c. 65, s. 6. *ante*, p. 316.

13. The Court has no jurisdiction for the cost of materials supplied to a vessel built and registered within the port of Quebec. *The Mary Jane*, 1 Stuart, 267.

14. Where the Court has clearly no jurisdiction, it will prohibit itself. *ibid.*

15. The Court of Vice-Admiralty exercises jurisdiction in the case of a vessel injured by collision in the river St. Lawrence, near the city of Quebec. *The Camillus*, 1 Stuart, 383.

16. In the case of forfeitures and penalties incurred by a breach of any Act of the Imperial Parliament relating to the trade and revenues of the British possessions abroad.

See *Vice-Admiralty Court*.

See *Forfeitures*, 1, 3, 4, 5.

(*Jurisdiction.*)

17. In the case of forfeitures and penalties incurred by a breach of any Act of the Provincial Parliament, relating to the customs, or to trade or navigation.

See *Vice-Admiralty Court*.

See *Forfeitures*, 2, 6, 9.

18. Although the Court abstains from interposing its authority in cases of mere disputed title, its jurisdiction over causes of possession has been constant and uninterrupted. *The Haidee*, 2 Stuart, 25.

See now Admiralty Court Act, 1861, sec. 8.

19. The occasion of the exercise of this jurisdiction arises generally in cases between part-owners, who cannot agree respecting the employment of their ships. *ibid*.

(All questions of dispute between co-owners may now be entertained by this Court. See Act of 1861, sec. 8. *The Seaward*, 3 E. C. R. 268.)

20. The authority of the Court to detain the ship at the instance of the real owner, against a mere wrong-doer, is undoubted. *ibid*.

21. When the Court has original jurisdiction of the principal matter, it has also cognizance of the incidents thereto. *ibid*.

22. The Court has jurisdiction in cases of collision occurring on the high seas, where both vessels are the property of foreign owners. *The Anne Johanne*, 2 Stuart, 43.

See *Collision*, 63, 67, 70, 95, 98, 118, 147, 151, 154, 160, 167.

23. The power of the Legislature of Canada extends to foreigners when within our own jurisdiction. *The Aurora*, 2 Stuart, 53.

24. As to other matters, in respect of which the Vice-Admiralty Courts have jurisdiction, see 26 Vict. c. 24, s. 10. *ante*, p. 356.

See now The Admiralty Act, 1891. *ante*, p. 402.

25. The jurisdiction of the Vice-Admiralty Courts in Her Majesty's possessions abroad, may be exercised, whether the cause or right of action has arisen within or beyond the limits of such possession. *ibid*, *ante*, s. 13, p. 357.

26. Except where it is expressly confined by that Act to matters arising within the possession in which the Court is established. *ibid*.

27. All proceedings for the condemnation and forfeiture of a ship, or ship and equipments, or arms and amunition of war, in pur-

(Jurisdiction.)

suance of "The Foreign Enlistment Act, 1870," shall be had in the Court of Admiralty, and not in any other Court. 33 & 34 Vict. c. 90, s. 19. 2 Stuart, 291.

See *Forfeitures*.

28. The Court can, under the 26 Vict. c. 24, s. 10, enforce the payment of reasonable towage, but has no authority to enforce an agreement to employ a particular steam-tug either for a definite or an indefinite quantity of work. *The British Lion*, 2 Stuart, 114.

See note to *The Hattie E. King*, Stockton, *ante*, p. 177.

29. "The Merchant Shipping Act, 1854," excludes the jurisdiction of the Admiralty in suits for wages when the amount due is less than £50 sterling. Where the balance due to the master of a ship appeared to be under that amount the claim was dismissed, without an exception to the jurisdiction pleaded. *The Margaretha Stevenson*, 2 Stuart, 192.

This is not now the law.

See note to *The Jonathan Weir*, *ante*, p. 80; also see *The W. J. Aikens*, 4 E. C. R. 7.

See *Wages*.

30. The Vice-Admiralty Court at Halifax, in Nova Scotia, exercises jurisdiction in the case of a vessel injured by collision in the harbor of Halifax. *The Wavelet*, 2 Stuart, 354, 357; s. c. Young, 34. *Collision*, 149, 153.

31. Also where damage was caused to a wharf by the vessel. *The Chase*, 2 Stuart, 361; s. c. Young, 113.

32. "The Imperial Act" (24 Vict. c. 10), whereby the jurisdiction of the High Court of Admiralty of England has been extended and the practice improved, confers jurisdiction upon it over claims for damage to cargo imported into England or Wales, and for wages due to seamen under a special contract. *The City of Petersburg*, 2 Stuart, 350; Young, 1.

See Imperial Act, 24 Vict. c. 10, s. 6. *ante*, p. 348.

33. A similar jurisdiction has been conferred upon the High Court of Admiralty of Ireland. 30 & 31 Vict. c. 114, ss. 33, 37; 2 Stuart, p. 268.

34. But withheld from the Courts of Vice-Admiralty, as not included in the Act 26 Vict. c. 24. *ante*, p. 356.

But they now have the jurisdiction.

(Jurisdiction.)

35. Two out of three promovents shipped at Bermuda, on board the ship libelled, a blockade runner, for the round voyage from Bermuda to Wilmington, North Carolina, and thence to Halifax, Nova Scotia. The remaining promovent shipped at Wilmington in room of one of the others. No ship's articles were signed, but there was evidence to show that the master had contracted to pay to each of the promovents a certain specified sum, in three equal instalments. The contract was absolute as to two of the instalments, and, as to the third, there was a condition that it was to be paid only if the claimants' conduct were satisfactory. *Held*, (1) That this was not an ordinary engagement for seaman's wages, but a special contract; (2) That previous to the Admiralty Court Act of 1861, 24 Vict. c. 10, the High Court of Admiralty had no jurisdiction over such contract; (3) That this Act did not extend to the Vice-Admiralty Courts, nor were the provisions respecting special contracts embraced in its tenth section extended to those Courts by the Act of 1863, 26 Vict. c. 24, s. 10; (4) That, although the commission formerly issued to the Vice-Admiralty Judge empowered him "to hear and determine all causes according to the civil and maritime laws and customs of our High Court of Admiralty of England," yet this power, like some others assumed to be bestowed by the commission, is frequently inoperative. And that therefore this Court has no jurisdiction in cases like the present; *held*, also, that, although the respondents were bound to have objected to the jurisdiction in *limine*, by appearing under protest, still, that, where the Court is of the opinion that it has no jurisdiction, it will not only entertain the objection at the hearing, but is bound itself to raise it. *The City of Petersburg*, Young, 1; 2 Stuart, 343; 1 Oldright, 814.

36. Where the vessel saved was brought into a port in Newfoundland, and then sold; but a portion of her materials was brought to Halifax, and then proceeded against by two of the salvors who had not been paid in Newfoundland. *Held*, That the Court had full jurisdiction, salvage constituting a lien upon the goods saved. *The Flora*, Young, 48.

See *Salvage*, 46.

37. The question of jurisdiction was raised in a case of collision, on the ground that neither of the vessels was owned in the British possessions. *Held*, That the Court had jurisdiction. *The Clementine*, Young, 186.

(Jurisdiction.)

38. *Quære*: As to the jurisdiction to inquire into a special contract, with regard to the wages of a master, where the contract has been made in England. *The Peeress*, Young, 265.

39. Power of the Court to entertain suits brought to recover penalties for breach of revenue laws. *The Queen v. Flint*, Young, 280.

See *The Three Sisters*, Young, 152.

See *Admiralty Jurisdiction*.

See *Collision*.

40. Since (26 & 27 Vict. c. 24, s. 10) the Vice-Admiralty Court has jurisdiction to entertain a claim for damage to property done by any ship, a railway car, for instance, standing upon a wharf within the body of a county. *The Teddington*, Stockton, 45.

See *Collision*.

41. For a statement of the cases as to the right of the Court, since the Admiralty Act, 1891, to entertain a suit for wages, irrespective of amount claimed, see *The Jonathan Weir*, Stockton, *ante*, p. 80.

See *The W. J. Aikens*, 4 E. C. R. 7.

42. For citation of cases as to the jurisdiction of the Court in cases of personal injury, see note to *The Enrique*, Stockton. *ante*, p. 161.

43. For the statement of the law upholding the jurisdiction of the Court in causes of damages to a stationary object, a bridge for instance, see *The Maggie M.* and note, Stockton. *ante*, p. 185.

See *Collision*, 164; *Towage*; *Wages*.

44. The Maritime Court of Ontario had no jurisdiction to entertain a cause of damage to a tow, arising from the negligence of the towing vessel, where no collision between vessels had taken place. *The Sir S. L. Tilley*, 8 Can. L. T. 156.

This judgment is based on the authority of *The Robert Pow*, Br. & Lush. 99, which is not now the law.

See *ante*, p. 162.

45. A propeller, while passing through the Welland Canal, owing to the fault of the owners, broke the head gate of a lock, in consequence of which water rushed from the upper to lower level into locks below, then overflowed the canal banks and flooded plaintiff's farm, doing serious injury. *Held*, The Court had jurisdiction to entertain the suit. *The Walter S. Frost*, 5 Can. L. T. 471.

JUSTICES OF THE PEACE.

1. Although justices of the peace exercising summary jurisdiction be the sole judges of the weight of evidence given before them, and no other of the Queen's Courts will examine whether they have formed the right conclusion from it or not, yet other Courts may and ought to examine whether the premises stated by the justices are such as will warrant their conclusion in point of law. *The Scotia*, 1 Stuart, 160.

See *Jurisdiction*, 10.

2. They cannot give themselves jurisdiction in a particular case by finding that as a fact which is not a fact. *ibid.*

3. When a justice of the peace, acting under the authority of the Merchant Seamen's Act (5 & 6 Wm. IV. c. 19, s. 17), had awarded wages to a seaman on the ground that a change of owners had the effect of discharging the seaman from his contract, this Court, considering that the proceedings had before the justice of the peace did not preclude it from again entering into the inquiry, *Held*, That the contract of the seaman was a subsisting contract with the ship, notwithstanding her sale. *ibid.*

4. In no form can this Court be made ancillary to the Justices' Court, still less be required to adopt, without examination, as legal premises on one demand, the premises which the Justices' Court may have adopted as legal premises on another demand. *ibid.*

5. In a suit for the recovery of wages under the sum of fifty pounds, justices acting under the authority of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, ss. 188, 189), may refer the case to be adjudged by this Court. *The Varuna*, 1 Stuart, 357.

6. Where a limited authority is given to justices of the peace, they cannot extend their jurisdiction to objects not within it, by finding as a fact that which is not a fact; and their warrant in such case will be no protection to the officer who acts under it. *The Haidee*, 2 Stuart, 25.

7. Under sec. 523 of the Merchant Shipping Act, 1854, a ship cannot be seized upon an order made by justices of the peace, against a person who at the time, is neither owner nor intrusted with the possession or control of her. *ibid.*

8. Where a statute required the execution of a warrant or process, under an order of two justices of the peace, to levy seamen's wages to be authorized by the Judge of the Vice-Admiralty Court. *Held*,

(Justices of the Peace.)

That the enactment imposed upon the Court, a duty to supervise the proceedings of the magistrates, and it appearing that the process had issued for the sale of an undivided interest in a vessel, and not legally, a petition to authorize them, refused. *The Canadienne*, Cook, 209.

See *Beattie v. Johansen*, 28 N. B. 26.

JUSTIFICATION.

1. In an action by a seaman against the master, a justification on the ground of mutinous, disobedient, and disorderly conduct sustained. *The Coldstream*, 1 Stuart, 386.

2. To the same effect, see *The Bridgewater*, Cook, 252.

KERR (JUDGE).

1. Appointed judge of the Vice-Admiralty Court of Quebec, by letters patent, under the Great Seal of the High Court of Admiralty of England, August 19, 1797. 1 Stuart, 152.

2. His duties discharged by a deputy from August 30th, 1833, until his removal in 1834. *ibid.*

3. Two of his judgments. 1 Stuart, 383.

LAKES.

See *Inland Navigation*, 2.

LANDSMAN.

Quære: Whether a mere landsman shipping himself as an able-bodied seaman is entitled to any allowance whatever. *The Venus*, 1 Stuart, 92.

This is now governed by The Merchant Shipping Act, 1854.

See *Hanson v. Royden*, L. R. 3 C. P. 47.

LARBOARD.

For a probable derivation of this nautical term, see 1 Stuart, p. 235, n.

LAW OFFICERS.

1. Opinion of the law officers of the Crown in England as to the authority of the judge to establish a table of fees. 1 Stuart, 69.

2. Opinion of the law officers of the Crown in Canada as to the practice of requiring proxies to be produced under certain circumstances. *ibid.*, 247.

LETTERS OF MARQUE.

See Stewart, 382, 394.

LIBEL.

1. All that is required in a libel for seaman's wages, is to state the hiring, rate of wages, performance of the service, determination of the contract, and the refusal of payment. *The Newham*, 1 Stuart, 71.

LICENSES.

1. To trade to St. Domingo under Order in Council, 19th November, 1806, the license cannot be dispensed with. *The Clyde*, Stewart, 100.

2. To export from Great Britain to the United States, not necessary that the person who obtained it should be owner or actual lader if he had the direction of it. *The Abigail*, *ibid*, 355.

3. It cannot be granted by an ambassador to trade with the enemy. *The Sally Anne*, *ibid*, 367.

4. A license granted under the Order in Council of April 8, 1812, authorizing certain exports and imports from Halifax to the United States, not valid after the war commenced with the United States, now rendered valid by the new order of October 13, 1812, which directed licenses to be granted notwithstanding such war. *The Economy*, *ibid*, 446.

5. A license granted by the British Consul in the United States void. *The Reward*, *ibid*, 470.

6. A contrary decision given in the High Court of Admiralty. *The Hope*, *ibid*, 482.

7. When the license had been burned under a mistake, upon proof of the fact, the vessel restored. *The Frederick Augustus*, *ibid*, 486.

8. A license to trade between two ports of the enemy void, and claimant's expenses allowed under particular circumstances. *The Expedition*, *ibid*, 488.

9. The benefits of a license not forfeited by carrying a common letter bag, extracts from newspapers, or the dispatches of an ambassador of the enemy in a neutral country to his own government. *The Henry*, *ibid*, 489.

10. Not suspended by an order for blockade, where such appears to be His Majesty's intention. *The Orion*, *ibid*, 497.

(Licenses.)

11. Licenses are no protection to parties not named or described in them. *The Johanna*, *ibid*, 521; *The Arab*, *ibid*, 546.

12. And there is no exception in favor of British subjects. *The Ouba*, *ibid*, 525.

13. It is forfeited by a deviation from the voyage, and taking in a cargo. *The Eunice*, *ibid*, 528.

14. A leak and want of water no excuse for deviating from the licensed voyage. *The Pilgrim*, *ibid*, 533.

See *The Belle*, *ibid*, 537.

LIEN.

See *Maritime Lien*.

LIGHTS.

1. The hoisting of a light in a river or harbor at night, is a precaution imperiously demanded by prudence, and the omission cannot be considered otherwise than as negligence *per se*. *The Mary Campbell*, 1 Stuart, 225 n.

2. A vessel, at anchor in the stream of a navigable river, must have at night a light hoisted to mark her position. *The Miramichi*, *ibid*, 240.

3. The omission to have a light on board in a river or harbor at night, amounts to negligence *per se*. *The Dahlia*, *ibid*, 242.

4. Damages were awarded for a collision, although the night at the time was reasonably clear, sufficiently so for lights to be seen at a moderate distance. *The Niagara*, *ibid*, 308.

5. By the Admiralty regulations, and by the Act of the Legislature of Canada, which makes precisely the same provision, sailing vessels when under weigh are required, between sunset and sunrise, to exhibit a green light on the starboard side and a red light on the port side of the vessel; and such lights are to be constructed as stated in such regulations. *The Aurora*, 2 Stuart, 52.

6. For rules concerning lights, issued in pursuance of the Merchant Shipping Act Amendment Act, 1862, and of an Order in Council, dated January 9th, 1864, see 2 Stuart, p. 301.

7. The same rules adopted in the Province of Canada by an Act of the Legislature passed June 30th, 1864. *ibid*, 315.

8. In the United States of America by an Act of Congress passed April 29th, 1864. *ibid*, 318.

(Lights.)

9. And in the Dominion of Canada by an Act passed May 22nd, 1868. *ibid*, 315. For diagrams to illustrate the use of the lights carried by vessels under the regulations of this Act, see *ibid*, 323.

10. A steamer, while at anchor, showed a green and white light instead of a white light only. *Held*, To have been in fault. *The Lorne*, 2 Stuart, 177.

11. Anchor lights, in oblong and not in globular lanterns, as directed by the Act respecting the Navigation of Canadian Waters, being equal in power, *Held*, To be a substantial compliance with the provisions of the Act. *The General Birch*; *The Progress*, Cook, 240.

12. Previous to the regulations of 1880, an overtaken vessel held not bound to show a stern light. *The Cybele*, *ibid*, 190.

13. The rule as to when a stern light is to be exhibited explained. *The European*, *ibid*, 286.

14. Where the lights of the complaining vessel were not properly burning, and were not visible on board the other vessel, *Held*, That in the absence of proof that this latter was also to blame, the suit must be dismissed. *The Arklow*, Stockton, 72.

15. An omission to exhibit a masthead white light will render a tug liable to a moiety of the damages, although the collision was mainly caused by the other tug being on the wrong side of the channel of a river. *The General*, *ibid*; *ante*, 86.

For existing regulations respecting the navigation of Canadian waters, see *ante*, p. 372. (R. S. C. c. 79.)

See *Collision*, 118, 126, 134, 138, 156, 161, 162, 163.

LIMITATION.

1. There seems to be no fixed limit to the duration of a maritime lien. *The Hercyna*, 1 Stuart, 274.

2. It is not, however, indelible, but may be lost by negligence or delay, where the rights of third parties may be compromised. *ibid*.

3. To the same effect, see *The Haidee*, 2 Stuart, 25; *The Aura*, Young, 54.

See note to *The Plover*, *ante*, p. 134.

See also *The Kong Magnus* (1891), P. 223.

LOG-BOOK.

1. Entry of desertion in official log-book deemed sufficient evidence of fact, unless seamen show to Court good reason for leaving the ship. *The Washington Irving*, 2 Stuart, 97.

See *Evidence*.

See *Merchant Shipping Act*, 1854, ss. 244, 281.

LOOKOUT.

1. As to the necessity, in all cases of a proper and sufficient lookout. *The Niagara*, 1 Stuart, 308.

2. The ship is clearly responsible for the fault of her lookout. *The Mary Bannatyne*, *ibid*, 354.

3. The want of a competent and vigilant lookout exacts, in all cases, from the vessel neglecting it, clear and satisfactory proof that the misfortune encountered was in no way attributable to her misconduct in this particular. *The Secret*, 2 Stuart, 133.

4. It is not judicious that the man stationed as the lookout should be a foreigner speaking English imperfectly, and consequently liable to make reports slowly and incorrectly, and perhaps more or less unintelligibly. *The Oriental*, *ibid*, 144.

See *The Courier*, *ibid*, 91; *The Gordon*, *ibid*, 198.

5. The speed of the steamer, and her defective lookout, rendered her liable for damages caused by collision.

The Alhambra, Young, 249.

6. A sufficient lookout must be maintained throughout, and neglect in this respect will create liability for damage resulting. *The Clementine*, *ibid*, 186.

7. The M., close-hauled on her port tack, heading about south-west by west, and going about three knots an hour, with the wind south, came into collision with the M. P. heading east, and running free about ten knots an hour. *Held*, from the evidence, the M. P. had no proper lookout, and she was accordingly condemned in damages and costs. *The Maud Pye*, Stockton, 101.

See note to this case, *ante*, at p. 104.

See also *The Paramatta*, *ante*, p. 192.

See *Collision*, 48, 84, 132, 148, 153, 156, 165, 168.

LORD HIGH ADMIRAL.

1. Nothing in the Vice-Admiralty Court Act, 1863 (26 Vict. c. 24, s. 7), to affect the powers of the Lord High Admiral.

See note to *The Teddington*, *ante*, p. 60.

2. Their powers and history. *The Little Joe*, Stewart, 394.

MANAGEMENT OF SHIP.

1. Vessel not liable for mismanagement of pilot under the law. *The Lotus*, 2 Stuart, 58.

MARINER.

See *Seamen*.

MARINER'S CONTRACT.

1. Articles not signed by the master as required by the General Merchant Seamen's Act (7 & 8 Vict. c. 112, s. 2), cannot be enforced. *The Lady Seaton*, 1 Stuart, 260.

This is now governed by the Merchant Shipping Act, 1854, and R. S. C. c. 74.

2. A promise made by the master at an intermediate port in the voyage to give an additional sum over and above the stipulated wages in the articles is void for want of consideration. *The Lockwoods*, 1 Stuart, 123.

3. Change of owners, by the sale of the ship at a British port, does not determine a subsisting contract of the seamen, and entitle them to wages before the termination of the voyage. *The Scotia*, *ibid*, 160.

4. Where the voyage is broken up by consent, and the seamen continue, under new articles, on another voyage, they cannot claim wages under the first articles subsequent to the breaking up of the voyage. *The Sophia*, *ibid*, 219.

5. Whether, when a merchant ship is abandoned at sea *sine spe revertendæ*, in consequence of damage received and the state of the elements, such abandonment taking place *bona fide* and by order of the master, for the purpose of saving life, the contract entered into by the mariners is, by such circumstances, entirely put an end to; or whether it is merely interrupted, and capably, by the occurrence of any and what circumstances, of being again called into force. *The Florence*, *ibid*, 254, note.

6. Where seaman shipped for "a voyage from the port of Liverpool to Constantinople, thence (if required) to any port or places in the Mediterranean or Black Seas, or wherever freight may offer, with liberty to call at a port for orders, and until her return to a final port of discharge in the United Kingdom, or for a term not to exceed twelve months," and the ship went to Constantinople in prosecution of the contemplated voyage, and then returned to Malta, whence, instead of going to a final port of destination in the United

(Mariner's Contract.)

Kingdom, she came direct to Quebec in search of freight, which she had failed to obtain at the ports at which she had previously been, it was *Held*, That coming to Quebec could not be considered a prosecution of the voyage under the 94th section of the Mercantile Marine Act of 1850, re-enacted by the 190th section of the Merchant Shipping Act, 1854. *The Varuna*, 1 Stuart, 857.

7. The words "nature of the voyage" must have such a rational construction as to answer the leading purposes for which they were framed, viz.: to give the mariner a fair intimation of the nature of the service in which he engages. *ibid*, note, p. 361.

8. The words "or wherever freight may offer" are to be construed with reference to the previous description of the voyage. *ibid*, 360.

9. The words "or elsewhere" must be construed either as void for uncertainty, or as subordinate to the principal voyage stated in the preceding words. *ibid*, 361.

10. Where the voyage in the shipping articles is described as one to North and South America, *Held*, That such description is too indefinite under the Merchant Shipping Act, 1854. *The Marathon*, 2 Stuart, 9.

11. Where the voyage in the shipping articles is described as one to the United States, *Held* to be a good description under the terms "nature of the voyage" in the Merchant Shipping Act, 1854. *The Ellerslie*, *ibid*, 35.

12. Where the voyage was described to be from Liverpool to Savannah, and any port or ports of the United States, of the West Indies, and of British North America, the term of service not to exceed twelve months. *Held*, That the voyage intended was confined to the ports on the eastern shore of the continent, and that the articles did not authorize a voyage to San Francisco on the north-west coast. *The Ada*, *ibid*, 11, note.

13. Where there was a deviation in the voyage from that stated in the Shipping Articles, occasioned by a return to the port of Quebec, not specified in them, the engagement of a seaman was terminated, as there was no subsisting contract; and a plea to the jurisdiction alleging a subsisting voyage under the 149th section of the Merchant Shipping Act, 1854, which enacts that "no seaman who is engaged for a voyage or engagement to terminate in the

(Mariner's Contract.)

United Kingdom is entitled to sue in any Court abroad for wages," overruled. *The Latona*, 2 Stuart, 203.

14. *Quere*: How far can an engagement of a seaman, void from not stating the nature of the voyage, as required by the Merchant Shipping Act, 1854, be considered as operative under a subsequent Act (Merchant Shipping Act, 1873), which admits, instead, a statement of the maximum period of the voyage, and the ports and places (if any) to which it is not to extend. *ibid.*

15. Where seamen were shipped for a voyage from London to Quebec and back to the port of London. *Held*, That the nature of the voyage thus stated was a sufficient intimation to the mariner of its duration, and a substantial compliance with the provisions of the Merchant Shipping Acts, 1854 and 1873. *The Red Jacket*, Cook, 304.

16. Under the Seamen's Act (R. S. C. c. 74), a claim for less than \$200 for wages earned on board of a Canadian registered vessel must be enforced by a summary proceeding under secs. 48-55 of the Act. A County Court Judge has no jurisdiction to try such a claim in an ordinary action of wages. *Beattie v. Johansen*, 28 N. B. 26.

17. In shipping articles the following is a sufficiently precise description of the voyage: "From London to any port in Spain, thence to Newfoundland and British North America, United States, West Indies, Mediterranean, and Continent of Europe, backwards and forwards, in the prosecution of the Newfoundland trade, and back to the final port of discharge in the United Kingdom, such voyage not to exceed two years." No seaman who is employed for a voyage or engagement which is to terminate in the United Kingdom can sue in a Colonial Vice-Admiralty Court for his wages, unless discharged as directed by the General Merchant Seaman's Act.

The Admiralty Court has no jurisdiction in a suit to recover seamen's wages, unless the sum claimed amount to at least fifty pounds sterling. *The Velocity*, James, 390 (1855).

See *Jurisdiction*; *Nova Scotia*; *Special Contract*; *Seaman*; *Master of Ship*; *Wages*.

MARITIME COURT OF ONTARIO.

1. The Court has no jurisdiction in respect of claims that accrued before the proclamation bringing the Act, constituting the Court, into force. *The Kate Moffat*, 15 Can. L. J. N. S. 284.

(Maritime Court of Ontario.)

2. The sale of an American vessel under the process and by direction of the Court held valid. For cases on this subject of credit to be given throughout the world to sales under the authority of the Admiralty, see per Brown, J., of Detroit. *The Trenton*, 17 Can. L. J. N. S., 189.

3. No counter claim can be pleaded in this Court in a cause of damage. *The F. J. King*, 8 Can. L. T. 156.

See *Jurisdiction*, 44, 45.

This Court has been abolished, and jurisdiction given to the Exchequer Court of Canada by the Admiralty Act, 1891.

See *Vice-Admiralty Court*.

MARITIME LIEN.

1. Salvors have a right to retain the goods saved until the amount of the salvage be adjusted and tendered to them. *The Royal William*, 1 Stuart, 107.

2. In the civil and maritime law of England no hypothecary lien exists without actual possession for work done or supplies furnished in England to ships owned there. *The Mary Jane*, *ibid*, 267.

3. A maritime lien does not include or require possession. *The Hercyna*, *ibid*, 275 n.

4. It is defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process. *ibid*, p. 276.

5. Where reasonable diligence is used, and the proceedings are in good faith, the lien may be enforced into whosoever possession the *res* may come. *ibid*.

6. A maritime lien is not indelible, but may be lost by delay to enforce it when the rights of other parties have intervened. *The Haidee*, 2 Stuart, 25.

7. Except in the case of bottomry, a maritime lien is inalienable and cannot be assigned or transferred to another person, so as to give him a right of action *in rem* as assignee. *The City of Manitowoc*, Cook, 185.

8. The master of a vessel, who was also part owner, can proceed against the vessel for wages, and the fact that he had accepted a promissory note from three of his co-owners for the amount of his claim, which was never paid, did not deprive him of his lien upon the ship, although it had been sold to and paid for by a third party ignorant of the debt. *The Aura*, Young, 54.

(Maritime Lien.)

9. The plaintiff brought an action against the P. for wages and disbursements as master of the vessel. In answer to the master's request when abroad for a statement of his account and for payment, the managing owner sent the master his individual promissory note for \$800, payable with interest, on account of the wages. The managing owner subsequently became insolvent. The master, on his return to St. John, N. B., demanded payment from the owners of his wages and disbursements, the sum claimed including the amount of the promissory note. The owners, by their counterclaim, sought to set-off against the master's claim, among other things, the amount of the promissory note; but *Held*, That the master, under the circumstances of the case, had not lost his lien upon the vessel. The set-off was rejected, and the plaintiff held entitled to recover, with costs. *The Plover*, Stockton, 129.

See note to this case, *ante*, 134, where the English, American and Canadian cases are cited.

10. There is no maritime lien for freight and demurrage. *The Cargo ex Drake*, 5 Can. L. T. 471.

11. The master has a lien for wages as against a mortgage. *The C. N. Pratt*, 5 Can. L. T. 427.

See also *The Maytham*, 18 Can. L. J. 285.

12. The House of Lords, in *The Sara*, 14 App. Cas. 209, decided that a master had no lien for his wages and disbursements, but it was subsequently given by the Merchant Shipping Act, 1889 (Imp.), *ante*, p. 85. The same law now obtains by legislation in Canada as respects the inland waters. *ante*, p. 370.

13. As to priorities of liens, see note to *The Borzone*, *ante*, p. 118.

MARSHAL.

1. As to the appointment of marshal on a vacancy occurring in the office. 26 Vict. c. 24, s. 5.

This is now governed by the Admiralty Act, 1891.

2. He cannot deliver up prize property without an order from the Court. *Snook's Petition*, Stewart, 427.

3. As to fees formerly entitled to for custody of vessel, see *The Hiram*, Stewart, 583.

MASTER OF SHIP.

1. The master admitted as a witness in a case of pilotage. *The Sophia*, 1 Stuart, 96.

No witnesses are now incompetent by reason of interest.

2. A promise made by a master at an intermediate port on the voyage to give an additional sum over and above the stipulated wages in the articles is void for want of consideration. *The Lockwoods*, 1 Stuart, 123.

See *Mariner's Contract*.

3. Upon the death of the master during the voyage, the mate succeeds him as *hæres necessarius*. *The Brunswick*, *ibid*, 139.

4. Possession of the ship awards to the master appointed by the owner to the exclusion of the master named by the shippers of the cargo. *The Mary and Dorothy*, 1 Stuart, 187.

5. By 17 & 18 Vict. c. 104, s. 240, power is given to any Court having Admiralty jurisdiction in any of Her Majesty's dominions to remove the master of any ship, being within the jurisdiction of such Court, and to appoint a new master in his place, in certain cases. *ibid*.

6. The master of a merchant vessel may apply personal chastisement to the crew whilst at sea, the master thereby assuming to himself the responsibility which belongs to the punishment being necessary for the due maintenance of subordination and discipline, and that it was applied with becoming moderation. *The Coldstream*, 1 Stuart, 386.

See *Wages*, 26.

7. He is to have same remedies for wages as seamen (17 & 18 Vict. c. 104, s. 191), and also for his disbursements on account of this ship (24 Vict. c. 10, s. 10). See *ante*, pp. 85, 348, 370.

8. His duties in case of collision under R. S. C. c. 79, s. 10, *ante*, p. 382, and under the Merchant Shipping Act, 1873, s. 16. An omission of these duties is a misdemeanor.

See *Admiralty; Evidence; Jurisdiction; Wages; Seaman; Torts; Witness; Passenger; Maritime Lien*.

9. The master of a ship has a lien for wages as against a mortgagee. *The C. N. Pratt*, 5 Can. L. T. 417.

See also *The Maytham*, 18 Can. L. J. 285, to the same effect.

See *ante*, p. 370; *Priorities of Liens*, *ante*, p. 118.

10. The master of a steam barge allowed to sue for wages under £50, and it was held that damages for wrongful dismissal could be sued for and recovered as wages. *The W. B. Hall*, 8 Can. L. T. 169.

MATE.

1. The mate of a vessel is chargeable for the value of articles lost by his inattention and carelessness, and the amount may be deducted from his wages. *The Papineau*, 1 Stuart, 94.

See *Recoupment*.

2. A chief mate, suing for wages in the Court of Admiralty, is bound to show that he has discharged the duties of that situation with fidelity to his employers. *ibid*, note.

3. Amongst the most important of these duties are a due vigilance, care, and attention to preserve the cargo. *ibid*, note, p. 95.

4. Where a second mate is raised to the rank of a chief mate by the master during the voyage, he may be reduced to his old rank by the master for incompetency, and thereupon the original contract will revive. *The Lydia*, 1 Stuart, 136.

5. The death of the master and the substitution of the mate in his place does not operate as a discharge of the seaman. *The Brunswick*, *ibid*, 139.

6. By the maritime law, upon the death of the master during the voyage, the mate succeeds as *hæres necessarius*. *ibid*.

See *Master of Ship*.

MATERIAL MEN.

1. Persons furnishing supplies to ships in this country, technically called material men, have not a lien upon the ship for the amount of their supplies, and the Court has no jurisdiction to enforce demands of this nature. *The Mary Jane*, 1 Stuart, 267.

2. They have no lien upon British ships without actual possession. *ibid*, 270.

3. A vessel built and registered in a British possession is not a "foreign sea-going vessel" within the provisions of 3 & 4 Vict. c. 65. *ibid*, 272.

4. As to the claims for necessities, in respect of which Vice-Admiralty Courts have jurisdiction, see 26 Vict. c. 24, s. 10, *ante*, p. 356.

5. As to claims for necessities over which the Court has now jurisdiction, see 24 Vict. c. 10, *ante*, p. 348, and the Colonial Courts of Admiralty Act, 1890, *ante*, p. 387.

See *Necessaries*.

MERCHANT SHIPPING ACT, 1854.

1. The 189th section of this Act applies to foreign as well as to British vessels, and a Vice-Admiralty Court cannot entertain a suit for seamen's wages, the demand being below £50 sterling, unless upon a reference as prescribed by that Act.

The Monark, Cook, 345.

2. Nor is this limitation of its jurisdiction affected by the general language of the Vice-Admiralty Courts Act, 1863, which confers upon it jurisdiction as to "claims for seamen's wages," and as to "claims for master's wages and disbursements," but the two statutes being to some extent in *pari materia*, must be construed together. *ibid.*

3. See, however, *contra*, *The Robb*, 17 Can. L. J. 66. The Court has jurisdiction for any sum for wages. See *ante*, p. 80; also *The W. J. Aikens*, 4 E. C. R. 7.

See *Wages*.

4. For rule as to ships meeting each other, 296th section cited. *The Inga*, 1 Stuart, 340.

For sailing rules, see *ante*, 372.

5. Construction of the Act, as to agreements to be made with seamen. *The Varuna*, *ibid*, 357.

See *Mariner's Contract*; *Seamen*; *Collision*.

MERGER.

1. Where there has been a recovery in the Trinity House, the original consideration is merged in the judgment of the Trinity House. *The Phæbe*, 1 Stuart, 59.

MICHIGAN.

1. Opinion of the Supreme Court of Michigan, one of the United States of America, relating to the question whether or not the Western Lakes, in commercial character, are bodies of water like the ocean itself, or only such as those which lie entirely within the boundaries of a State of the United States. *The American Transportation Company v. Moore*, 2 Stuart, 329.

MINISTERIAL POWERS.

See *Interpretation of Terms*.

MISCONDUCT.

1. In a suit for wages, service and good conduct are presumed till disproved. *The Agnes*, 1 Stuart, 56.

2. A defence grounded on misconduct of seamen must be specially pleaded, with proper specification of the acts thereof. *ibid.*

3. In an action against the master for inflicting bodily correction upon an offending seaman, a justification on the ground of mutinous, disobedient and disorderly behavior sustained. *The Coldstream*, 1 Stuart, 386.

4. On the part of salvors, and reduction of salvage award in consequence. *The Charles Forbes*, Young, 172.

5. Damages occasioned by misconduct of pilot may be set off against his claim for pilotage. *The Sophia*, 1 Stuart, 96.

See *Presumption*.

See *Pilot*, 7, 8.

MISDEMEANOR.

See *Master of Ship*.

MOORING.

1. A vessel which moors alongside of another at a wharf or elsewhere, becomes responsible to the other for all injuries resulting from her proximity, which human skill or prevention could have guarded against. *The New York Packet*, 1 Stuart, 329 n.

See also *The We're Here*, Young, 138; *The Chase*, *ibid*, 113; *The Frier*, Stockton, *ante*, p. 180.

MORTGAGE.

1. Vice-Admiralty Courts have jurisdiction in respect of any mortgage when the ship has been sold by a decree of the Court, and the proceeds are under its control. 3 & 4 Vict. c. 65, s. 3, *ante*, p. 315; 24 Vict. c. 10, s. 11, *ante*, p. 350.

MUTUAL FAULT.

See *Division of Damages*.

NAVIGATION.

1. The same rules of navigation, and the same precautions for avoiding collisions and other accidents as are now adopted in the United Kingdom and other countries, are also adopted in the Dominion of Canada. R. S. C. c. 79, *ante*, p. 372.

NAVIGATION LAWS.

1. The utility of navigation laws, particularly in the colonies. *The Economy*, Stewart, 446.
2. The law as to importation of spirits of turpentine under 33 Geo. 3, c. 50, s. 14 — importers made owners under that statute, and British subjects, resident abroad, cannot import under it. *The Nancy*, *ibid*, 49.
3. As to 27 Geo. 3, c. 27, free port act. None but the enumerated goods can be imported. Not suspended by war with Spain by the Order in Council, 23rd Sept., 1803. Non-enumerated articles only forfeited, not the vessel and the enumerated articles. *The Nuestra Senora del Carmen*, *ibid*, 83.
4. Clearing out to Boston; entering, trading and clearing out from thence to Halifax, is importation from Boston. *The Union*, *ibid*, 98.
5. To avoid the embargo of the American government, no excuse for entering Halifax. *The Patty*, *ibid*, 299.
6. Certificate of probable cause of seizure must be granted upon facts appearing in the cause, not by subsequent affidavits, under 4th Geo. 3, c. 15, s. 46. *The Fame*, *ibid*, 112.
7. Putting into Philadelphia in distress, without landing or entering a cargo, not an importation from thence. Touching at Cork for a convoy, and at Madeira, no deviation from a license from Bristol to St. Domingo. *The Active*, *ibid*, 169.
8. Offences when to be tried. 49 Geo. 3, c. 107. Aliens acting as merchants in the colonies. *The Providence*, *ibid*, 186.
9. Change of master not indorsed on the register, vessel liable to forfeiture. *The Friends Adventure*, *ibid*, 200.
10. Importation to avoid the American embargo, no excuse for importing into Nova Scotia. *The Dart*, *ibid*, 301.

It must be noted that the Navigation Laws have long since been repealed, and the cases decided thereunder have now no practical value.

NAVY.

1. Vice-Admiralty Courts have jurisdiction in all cases of breach of the regulations and instructions relating to Her Majesty's navy at sea (26 Vict. c. 24, s. 11). This Act was, however, repealed by the Colonial Courts of Admiralty Act, 1890, *ante*, p. 387. See sec. 2, sub-sec. 3, of the latter Act as to present jurisdiction respecting the navy.

NECESSARIES.

1. The *E.*, a small vessel owned in New Brunswick, being much out of repair when in Nova Scotia, and her master having neither money nor credit, the plaintiff agreed to furnish supplies, which were accepted by the workmen in payment of their wages, and the required repairs were thus effected. Subsequently not having been paid, he arrested the vessel for necessities supplied, no owner being domiciled within the province. *Held*, That he was entitled to recover the amount of his claim. *The Emma*, Young, 282.

2. An agent for a foreign vessel made advances and disbursements for her use in account with her owner. The vessel afterwards sailed on her voyage, but was brought back in a wrecked state to the port of departure. *Held*, That the agent could not then treat his claim as one for necessities, under the Vice-Admiralty Courts Act, 1863. *The City of Manitowoc*, Cook, 178.

3. When necessities are supplied under circumstances which show that credit was given to the owner exclusively, the master is not liable. *Smith v. Irwin*, 5 Can. L. T. 573.

For present jurisdiction as to necessities, see 3 & 4 Vict. c. 65, s. 6, *ante*, p. 316; and 54 & 55 Vict. c. 27, s. 2, sub-sec. 2, *ante*, p. 387.

NELSON (CHIEF JUSTICE).

1. His opinion, sitting in the Circuit Court of the United States, respecting compulsory pilotage. *The China*, 2 Stuart, 231 n.

NON-USER.

See *Desuetude*.

NOVA SCOTIA.

1. Opinion of Sir William Young, Chief Justice, sitting as judge in the Vice-Admiralty Court of Nova Scotia at Halifax, relating to the question of jurisdiction over a contract for wages different from the ordinary mariner's contract. *The City of Petersburg*, 2 Stuart, 343; s. c. Young, 1.

2. Opinion of the same respecting compulsory pilotage, and as to the jurisdiction of the Court of Vice-Admiralty over a vessel injured by a collision in Halifax harbor, within the body of a county. *The Wavelet*, *ibid*, 356; Young, 34.

3. Opinion of the same as to the jurisdiction in case of damage done to a wharf by a ship. *The Chase*, *ibid*, 361; Young, 113.

(*Nova Scotia.*)

4. Opinion of the same that the ports of the Dominion of Canada are to be considered "home ports" in relation to each other, and a bottomry bond given on a Canadian vessel in a Canadian port not enforceable. *The Three Sisters*, *ibid*, 370; Young, 149.

OATHS.

See *Registrar; Perjury*.

OFFENCES.

1. For authority in Commission of Judge to try offences committed within the jurisdiction of the Admiralty, see 1 Stuart, 380.

2. All persons charged in any colony with offences committed on the sea, may be dealt with in the same manner as if the offence had been committed on waters within the local jurisdiction of the Courts of the colony. 12 & 13 Vict. c. 96, s. 1. See *ante*, *The Chesapeake*, p. 288; 2 Stuart, p. 298.

3. The statute 18 & 19 Vict. c. 91, s. 21, relates to offences on board British ship on high sea, but nothing in that section shall interfere with 12 & 13 Vict. c. 96.

4. As to offences under "The Foreign Enlistment Act, 1870," see 33 & 34 Vict. c. 90. 2 Stuart, p. 286.

See *Foreign Enlistment Act*.

ONTARIO.

See *Quebec*.

ONUS PROBANDI.

1. Where a ship at anchor is run down by another vessel under sail, the *onus probandi* lies with the vessel under sail to show that the collision was not occasioned by any error or default on her part. *The Miramichi*, 1 Stuart, 240.

2. Where a vessel at anchor is run down by another, the onus lies on the latter to prove the collision arose from some cause which would exempt her from liability. *The John Munn*, *ibid*, 266.

3. In case of collision the onus is, in the first instance, on the party complaining. *The Margaret*, 2 Stuart, 19.

See *The Secret*, *ibid*, 133.

OPTION.

Electa una via, non datur recursus ad alteram. Where a party had his option to proceed either before the Trinity House or before the Admiralty, and made his option of the former, by that he must abide as well in respect of the execution of the judgment as in the obtaining of it. *The Phæbe*, 1 Stuart, 59.

ORDERS IN COUNCIL.

Cases upon the same.

1. September 23rd, 1803. Trade with the free ports to continue, notwithstanding hostilities with Spain. *The Nuestra Senora del Carmen*, Stewart, 83.
2. November 19th, 1806. License to trade to St. Domingo. *The Clyde*, *ibid*, 100.
3. June 24th, 1803. Colonial trade contraband on the outward voyage. Grounds of condemnation. *The United States*, *ibid*, 116.
4. July 15th, 1807. A qualified license to trade to St. Domingo; and December 14th, 1808, trade to St. Domingo laid open. *The Beaver*, *ibid*, 173.
5. April 26th, 1809. Not revoked in consequence of the Duke de Cadori's letter of August 5th, 1810. *The New Orleans Packet*, *ibid*, 260.
6. October 2nd, 1807. Blockade of the Eyder discontinued July 13th, 1809. May 31st, 1809, trade to Heligoland; November 11th, 1807, trade in enemy's produce revoked April 26th, 1809. *The Thomae*, *ibid*, 269.
7. November 11th, 1807. Certificates of origin revoked by April 26th, 1809. *The American*, *ibid*, 286.
8. January 7th, 1807. Trading between enemy's ports. *The Express*, *ibid*, 292.
9. July 31st, 1810. Petition of Sir J. Warren to detain certain American vessels. *ibid*, 327.
10. April 26th, 1809. Suspended by order June 23rd, 1812, conditionally. The condition not having been complied with, the first order is in full force again. *The George*, *ibid*, 389.
11. April 8th, 1812. Permission to import and export from Halifax to the United States wheat, etc.; October 13th, 1812, the same, notwithstanding hostilities with the United States. *The Economy*, *ibid*, 446.

(Orders in Council.)

12. October 26th, 1812. Confirming Admiral Sawyer's licenses. *The Reward, ibid*, 470.

13. April 26th, 1809. Prohibiting commerce with France; the principle of it considered and justified; not a blockade properly speaking, but a defensive measure of another kind. *The Orion, ibid*, 497.

14. June 27th, 1832. Establishing rules of Court. 1 Stuart, 6.

15. November 20th, 1835. *The John and Mary, ibid*, 64; *The London, ibid*, 140.

16. August 23rd, 1883. As to rules of 1883. Cook, 372.

17. March 15th, 1893. Authorizing rules of 1893. See *ante*, p. 410.

See *Rules; Regulations; Table of Fees*.

OWNERS.

1. Owners of vessels are not exempt from their legal responsibility, though their vessel was under the care and management of a pilot. *The Cumberland*, 1 Stuart, 75.

2. Change of the owner, by the sale of a ship at a British port, does not determine a subsisting contract of seamen, and entitles them to wages before the termination of the voyage. *The Scotia, ibid*, 160.

3. The Court of Admiralty has authority to arrest a ship upon the application of the owner, in a case of possession. *The Mary and Dorothy, ibid*, 187.

4. Having a pilot on board, and acting in conformity with his directions, does not discharge the responsibility of the owners. *The Lord John Russell, ibid*, 190.

5. But the owner of a ship is not responsible for damage done by his ship, occasioned solely by default of a branch pilot, employed by compulsion of law. *The Lotus*, 2 Stuart, 58.

See cases: *The Arabian, ibid*, 72; *The Alma, ibid*; *The Anglo-Saxon, ibid*, 117.

6. To entitle the owner of a ship, having by compulsion of law a pilot on board to the benefit of the exemption from liability for damage, the fault must be exclusively that of the pilot. *The Courier*, 2 Stuart, 91.

(Owners.)

7. If a licensed pilot is on board a vessel, in order to exempt the owner from liability for damage occasioned by collision, the *onus probandi* lies upon such owner to establish that the collision was occasioned solely by the negligence of the pilot. *The Secret, ibid*, 133.

8. The exemption from liability is not taken away from the owners of the damaging vessel, though the master have the power of selection from amongst a number of pilots; and, though in consequence of such selection, the same pilot has in fact piloted the ship for many years. *The Hibernian, ibid*, 148.

9. A person may be considered as the owner of a vessel, though his name has never been inserted in the bill of sale or ship's register. *The Anglo-Saxon, ibid*, 117.

See *Pilot; Possession*.

PASSENGER.

1. The relation of master and passenger produces certain duties of protection by the master analagous to the powers which the law vests in him as to all the persons on board his ship; any wilful violation of which duties, to the personal injury of the passenger, entitles the latter to a remedy in the Admiralty, if arising on the high seas. *The Friends*, 1 Stuart, 118.

2. Unless in case of necessity, the master cannot compel a passenger to keep watch. *ibid*, 120.

3. The master may restrain a passenger by force, but the cause must be urgent, and the manner reasonable and moderate. *ibid*, 122.

4. The authority of the master will always be supported by the Courts so long as it is exercised within its just limits. *The Toronto, ibid*, 179.

5. Damages awarded against a master of a vessel for having, in a moment of ill-humor, attempted to deprive a cabin passenger of his right to the use of the quarter deck and cabin, and to separate him from the society of his fellow-passengers. *ibid*, 180.

6. For salvage by a passenger, see *The Stella Marie*, Young, 16.

See *Admiralty; Assault; Jurisdiction; Damages to Person; Salvage; Vice-Admiralty*.

PATRONE.

1. Import of the term in the Mediterranean States. *The Scotia*, 1 Stuart, 166.

DIGEST.

PAYMENT.

Of awards to salvors, directions by Court. *The Runeberg*, Young, 42.

PENALTY.

1. If any Act be prohibited under a penalty, a contract to do it is void. *The Lady Seaton*, 1 Stuart, 263.

2. For violation of revenue laws. *The Minnie*, Young, 65.

3. Upon breach of revenue laws, suit for penalty. *The Queen v. Flint*, Young, 280.

See *Perjury*.

PERJURY.

1. Any person who shall wilfully swear falsely in any proceeding before the registrar or other person authorized to administer oaths in any Vice-Admiralty Court, shall be deemed guilty of perjury, and shall be liable to all the penalties attaching to corrupt perjury. 24 Vict. c. 10, s. 26, *ante*, p. 353.

PILOT.

1. The mode, the time, and the place of bringing the vessel to an anchor is within the peculiar province of the pilot who is in charge. *The Lotus*, 2 Stuart, 58.

2. Where a pilot is on board the ship he must be actually on deck and in charge to relieve the owners of their responsibility. *The Courier*, 2 Stuart, 91.

See *The Gordon*, *ibid*, 198.

3. The pilot in charge of a ship is solely responsible for getting the ship under weigh in improper circumstances. *The Anglo-Saxon*, *ibid*, 117.

4. The duty of the pilot is to attend to the navigation of the ship, and the master and crew to keep a good lookout. *The Secret*, *ibid*, 133.

5. The owner of a ship not liable in damages for a collision occasioned by the fault of a pilot, where there is a penalty attached to a refusal to take such pilot. *The Hibernian*, *ibid*, 148.

6. A pilot is a mariner, and as such may sue for his pilotage in the Vice-Admiralty Court. See 2 Will. 4, c. 51; 1 Stuart, 4.

7. A pilot who has the steering of a ship is liable to an action for an injury done by his personal misconduct, although a superior officer be on board. *The Sophia*, 1 Stuart, 96.

(Pilot.)

8. Damages occasioned to the ship by the misconduct of the pilot may be set off against his claim for pilotage. *ibid.*

9. In cases of pilotage, where there has been a previous judgment of the Trinity House upon the same cause of demand, the Court has no jurisdiction. *The Phæbe, ibid, 59.*

10. Persons acting as pilots are not to be remunerated as salvors, but they may become entitled to extra pilotage, in the nature of salvage, for extraordinary services rendered by them. *The Adventurer, 1 Stuart, 101.*

11. The jurisdiction of the Court not ousted in relation to claims of this nature by the provisional statute 45 Geo. 3, c. 12, s. 12. *ibid.*

12. Owners of vessels are not exempt from their legal responsibility, though their vessel was under care and control of a pilot. *The Cumberland, ibid, 75.*

13. It is the exclusive duty of pilots in charge to direct the time and manner of bringing a vessel to anchor. *The Lord John Russell, ibid, 190.*

14. Having a pilot on board, and acting in conformity with his directions, does not discharge responsibility of owner. *The Creole, ibid, 199.*

See *Pilotage; Compulsory Pilotage.*

15. A vessel to blame for collision in Halifax harbor, in charge of a pilot. *Held, No ground of exemption from liability, pilotage not being compulsory. The Wavelet, Young, 34.*

See *Collision.*

PILOTAGE.

1. Vice-Admiralty Courts have jurisdiction in respect of pilotage (26 Vict. c. 24, s. 10). This Act is now repealed by Colonial Courts of Admiralty Act, 1890; but the Court has the same jurisdiction over pilotage as the High Court of Admiralty. Under the Merchant Shipping Act, 1854, s. 2, "seaman" includes pilot.

2. An indemnity in the nature of pilotage, based upon the Pilotage Act, 1873 (Can.) (36 Vict. c. 54), awarded to a pilot taken to sea without his consent. *The Farewell, Cook, 282.*

3. The Dominion Parliament may confer on the Vice-Admiralty Courts jurisdiction in any matter of shipping and navigation within the territorial limits of the Dominion. *ibid.*

(Pilotage.)

4. Where an Act of the Dominion Parliament is in part repugnant to an Imperial statute, effect will be given to its enactments in so far as they agree with those of the Imperial statute. *ibid.*

PILOT ACTS.

1. The English cases, by which the owners are exempted from responsibility, where the fault is solely and exclusively that of the pilot, not shared in by the master or crew, are based upon the special provisions of the English Pilotage Acts. *The Cumberland*, 1 Stuart, 81, n.

2. A construction is given in this case to the Lower Canada Pilot Act (45 Geo. 3, c. 12) and the Liverpool Pilot Act. *ibid.*

3. As to construction of Pennsylvania Pilot Act, see 1 Stuart, 199; also for provisions of General Pilot Act of England (6 Geo. 4, c. 125), see 1 Stuart, 82.

4. The whole of this Act is repealed by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 120); the limitation of the liability of owners, where pilotage is compulsory, re-enacted by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, s. 388); but it applies only to the United Kingdom Act of 1854, s. 330.

PIRATES.

1. As to jurisdiction of Vice-Admiralty Courts, respecting pirates or piratical vessels, see 26 Vict. c. 24, s. 12. *ante*, p. 357.

As to the authority of Admiralty Courts to entertain a suit for the restitution of goods piratically taken on the high seas, see *The Hercules*, 2 Dods. 369. The Act 26 Vict. c. 24, is now repealed, and the jurisdiction is the same as that exercised by High Court of Admiralty in England.

See *Habeas Corpus*.

See *The Chesapeake*. *ante*, p. 208.

PLEADINGS.

1. The allegations of a party must be such as to apprise his adversary of the nature of the evidence to be adduced in support of them. *The Agnes*, 1 Stuart, 56.

2. Less strictness required than in other Courts. *ibid.*

3. All the essential particulars of the defence should be distinctly set forth in the pleadings. *ibid.*

(*Pleadings.*)

4. The evidence must be confined to the matters put in issue, and the decree must follow the allegations and proofs. *ibid.*
5. The defendant not pleading a judgment, rendered in another Court, waives such ground of defence. *ibid.*
6. Where the misconduct of a mariner is relied on as a defence in an action for wages, it should be specifically put in issue. *ibid.*
7. Demand for watch taken from the seamen's chest by the master may be joined to the demand for wages. *The Sarah*, 1 Stuart, 87.
8. In a cause of damages, in which the proceedings were by plea and proof, acts appearing on the face of the libel to have been committed at a place which is not within the jurisdiction of the Court, rejected as inadmissible. *The Friends*, *ibid.*, 112.
The procedure by plea and proof is now abolished.
9. Pleadings said to be of little use in Courts of Admiralty. *The We're Here*, Young, 139.
10. It is a rule of the Admiralty that where there is a material variance between the allegations of the libel and the evidence, the party so alleging is not entitled to recover, although not in fault, and fault is established against the other vessel. *The Emma K. Smalley*, Stockton, *ante*, p. 106.
See note to this case, *ante*, p. 114; also *ante*, p. 154.
11. Under R. 61, every action now shall be heard without pleadings unless the judge shall otherwise order. *ante*, p. 425.

PORT.

1. Probable derivation of this nautical term. *The Leonidas*, 1 Stuart, 235, n.
2. Ports of Dominion are home ports in relation to each other. *The Three Sisters*, Young, 149.

POSSESSION.

1. Possession of a ship awarded to the master appointed by the owner, to the exclusion of the master named by the shippers of the cargo. *The Mary and Dorothy*, 1 Stuart, 187.
2. Power given to any Court, having Admiralty jurisdiction in any of Her Majesty's dominions, to remove the master of any ship, being within the jurisdiction of such Court, and to appoint a new master in his stead.
See 17 & 18 Vict. c. 104, s. 240.

(Possession.)

3. Jurisdiction of the Vice-Admiralty Court, in cases of possession, to reinstate owners of ship who have been wrongfully displaced from their possession. *The Haidee*, 2 Stuart, 25.

4. By 26 Vict. c. 24, s. 10, the jurisdiction of the Vice-Admiralty Courts was extended to claims between owners of any ship registered in the possession in which the Court is established touching the ownership, possession, employment or earnings of such ship. This Act is now repealed, and the jurisdiction is under 24 Vict. c. 24, s. 8. *ante*, p. 349.

See Pritchard's Digest for Lord Stowell's judgments as to the nature of this jurisdiction prior to the latter Act.

5. By the Vice-Admiralty Courts Act, 1863, an Admiralty Court has jurisdiction over claims between owners, where the ship is registered within the possession for which the Court is established. *The Edward Barrow*, Cook, 212.

6. The Dominion of Canada is not a possession within the meaning of the Act, so as to enable an Admiralty Court for one part of it to entertain jurisdiction over a vessel registered in another part for the enforcement of such claims. *ibid.*

But see now The Admiralty Act, 1891, s. 4.

7. J. H., when building a small vessel, was furnished with supplies therefor by D., who put into the vessel, upon the whole, a larger sum than J. H. did. It was afterwards agreed that D. should own half the vessel, and in addition to this he took a mortgage from J. H. previous to the completion of the registry of the vessel. It was filed at the Custom House, but could not be registered, as there was no registry of the vessel. On her completion the vessel was registered in the name of J. H., and no mention was made of D. as part owner. D. subsequently sold her to one C., who registered as owner under his bill of sale, and then J. H. took proceedings against both to regain possession. *Held*, That the Court could not cancel the registries, nor order a sale, as the parties had applied to the wrong Court; but J. H. and D. were strongly advised that they should have an account taken to ascertain the amounts respectively due them, and should sell the vessel to the best advantage. *The W. E. Wier*, Young, 145.

Since the Act of 1891, the Court has ample jurisdiction to settle all disputes.

PRACTICE.

1. The practice to be observed in suits and proceedings in the Courts of Vice-Admiralty abroad is governed by certain rules and regulations established by Order in Council under 2 Will. 4, c. 51. The practice is now governed by the rules of 1893, *ante*, p. 413, and when they are silent by the Admiralty rules in force in England.
2. The Court will require the libel to be produced at a short day, if the late period of the season, or other cause, renders it necessary. *The Newham*, 1 Stuart, 70.
3. Demand for a watch, etc., taken by the master from the seaman's chest, may be joined to the demand for wages. *The Sarah*, 1 Stuart, 87.
4. Where the judge has any doubt in regard to the manner of navigating ship's course, position, and situation, he will call for the assistance of persons conversant with nautical affairs to explain. *The Cumberland*, *ibid*, 78.
5. Probatory terms are in general peremptory, but may be restored for sufficient cause. *The Adventure*, *ibid*, 99.
6. Upon points submitted for the professional opinion of nautical persons, their opinion should be as definite as possible. *The Niagara*, *ibid*, 320.
7. In certain cases the Court will direct the questions to be reconsidered and more definitely answered. *ibid*.
8. As to the practice of examining witnesses under a release. *The Lord John Russell*, *ibid*, 194.
9. Amendment in the warrant of attachment not allowed for an alleged error not apparent in the acts and proceedings in the suit. *The Aid*, *ibid*, 210.
10. Suppletory oath ordered in a suit for subtraction of wages. *The Josepha*, *ibid*, 212.
11. Where the Court has clearly no jurisdiction it will prohibit itself. *The Mary Jane*, *ibid*, 267.
12. In salvage cases the protest made by the master, containing a narrative of facts when they are fresh in his memory, should be produced. *The Electric*, *ibid*, 333.
13. In courts of civil law the parties themselves have strictly no authority over the cause after their regular appearance by an attorney or proctor. *The Thetis*, *ibid*, 365.

(Practice.)

14. The attorney or proctor is so far regarded as the *dominus litis* that no proceeding can be taken except by him, or by his written consent, until a final decree or revocation of his authority. *ibid.*

The practice is now governed by the rules of 1893. *ante*, p. 413.

PRESUMPTION.

1. Where a ship at anchor is run down by another vessel under sail, the presumption is that the latter is in fault. *The Miramichi*, 1 Stuart, 240.

2. If the protest be not produced salvors are entitled to the inference that it is withheld because it would be too favorable to them. *The Electric*, *ibid.*, 333.

3. It is the duty of the person in charge of each ship to render to the other ship such assistance as may be practicable and necessary; and in case he fail so to do, and no reasonable excuse for such failure be shown, the collision will be deemed to have been caused by his wrongful act, neglect or default (25 & 26 Vict. c. 63, s. 33). *The Liberty*, 2 Stuart, 102.

4. Where the regulations for preventing collisions under the Merchant Shipping Acts, 1854 to 1873, have been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault. See R. S. C. c. 79, s. 5. *ante*, p. 381.

5. The fact that a steamer in motion collides with a vessel stationary is itself *prima facie* evidence of negligence on the part of the steamer. *The John Owen*, 5 Can. L. T. 565.

PRIMROSE (HON. FRANCIS WARD).

1. Was appointed deputy judge, surrogate and commissary of the Vice-Admiralty Court for Lower Canada by an instrument under the hand and seal of the Hon. James Kerr, judge thereof, on his being about to proceed to England, dated August 30th, 1833.

2. Discharged the duties of judge from that time until the removal of Mr. Kerr, in October, 1834.

3. Continued afterwards to do so, under the authority of the Imperial Act (56 Geo. 3, c. 86), to render valid the judicial acts of surrogates of Vice-Admiralty Courts abroad during vacancies in office of judges of such Courts, down to the time of the appointment of Mr. Kerr's successor, September 21st, 1836.

See *The John and Mary*, 1 Stuart, 64; *The London*, *ibid.*, 140.

PRIVY COUNCIL.

1. Opinion of the Lords of the Judicial Committee affirming the judgment of the Vice-Admiralty Court of Lower Canada in the case of *The Margaret*, 2 Stuart, 23.
2. Opinions of the Lords of the Judicial Committee affirming the judgments of the Vice-Admiralty Court of Lower Canada in the following cases: *The Quebec*, Cook, 34; *The Eliza Keith*, *ibid*, 117; *The Earl of Lonsdale*, *ibid*, 163.
3. The same altering the judgments of the Vice-Admiralty Court of Quebec. *The Underwriter* and *The Lake St. Clair*, *ibid*, 55.
4. The same affirming the judgment of the Vice-Admiralty Court of Nova Scotia. *The Chase*, Young, 125.
5. The same, reversing the judgment of the Vice-Admiralty Court of New Brunswick. *The Arklow*, Stockton, *ante*, 72.
6. On an appeal to the Privy Council, where their lordships named assessors, an opinion on a nautical point given by Canadian assessors may be overruled. *The Eliza Keith*; *The Langshaw*, Cook, 107.

PRIVATEER.

Must have a lawful commission. *The Ourlew*, Stewart, 312.

PRIZE.

1. As to power of prize agents and captors over prizes and proceeds before condemnation. *The Herkimer*, Stewart, 128.
2. They are not entitled to have prize goods deposited in their own private stores. *The La Merced*, *ibid*, 219.
3. The provincial law of attaching goods of absconding debtors, no excuse for their not paying unclaimed shares to Greenwich Hospital. *The Bermuda*, *ibid*, 231.
4. Selling before condemnation will forfeit goods to the Crown for misconduct on part of captors. *The La Reine Des Anges*, *ibid*, 9.
5. As to taking prize from the custody of the marshal. *The Cossack*, *ibid*, 513.
6. Court of Prize in a neutral country cannot deliver on bail without the consent of owners. *The Hibberts*, *ibid*, 40.
7. A prize, before condemnation, is a trust, and cannot be alienated without the consent of all parties, unless perishable. The King has

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no vested right till condemnation. The King's officers have no right to purchase when others have not; and have no pre-emption when sales can be made. Cases of public necessity for defence of country form an exception. *The Curlew, ibid, 312.*

8. Prizes detained upon the declaration of war by the United States, and under the Order in Council, July 31st, 1812, and ultimately condemned to the King, *jure coronæ*, as having been taken before the order for reprisals, could not be sold or bailed without an authority from the King, unless in a perishable state. Measures taken for their preservation. Petition of Sir John Warren.

ibid, 327.

9. Proceedings respecting the agents appointed by the Crown to receive them. *Snook's Petition, ibid, 427.*

10. Prizes taken before the order for reprisals, October 13th, 1812, not given to the captors by the order for distribution. *The Malcolm, ibid, 379.*

11. Prize taken under commission from the governor of a province, without a warrant from the Admiralty, not given to the captors by the proclamation for distribution.

The Little Joe, ibid, 382.

PROBATORY TERM.

See *Practice, 5.*

PROCTOR.

1. A settlement without the concurrence or knowledge of the promovent's proctor does not bar the claim for costs; and the Court will inquire whether the arrangement was or was not reasonable and just, and relieve the proctor if it were not.

The Thetis, 1 Stuart, 363.

See *Practice, 14.*

2. As to how far the Court will interfere on a complaint made by the registrar against proctors for non-payment of his fees, which they have received from their clients and not paid over to him. *Ex parte Drolet, 2 Stuart, 1.*

3. A premature action in some cases exposes the proctor acquainted with the facts of the case to the animadversion of the Court for the impropriety of creating unnecessary litigation. *The British Lion, ibid, 114.*

DIGEST.

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PROOF.

See *Evidence; Onus Probandi; Vis Major.*

See *Collision*, 108.

PROPERTY.

1. Condemnation of enemy's property. *The Venus*, Stewart, 12.

2. Forfeiture of property connected with enemy's property. *The Herkimer*, *ibid*, 17.

3. American property, concealed as Spanish in the slave trade, condemned. *The Merced*, *ibid*, 205.

PROTEST.

1. The production of the protest is necessary in all cases, whether of collision or salvage, but more particularly so in cases of salvage. *The Electric*, 1 Stuart, 333.

PROXIES.

1. In order to prevent proctors from proceeding in causes, on instructions from parties not having a legal *personæ standi* to prosecute a cause, the Court may require the production of proxies. *The Dumfriesshire*, 1 Stuart, 245.

See *Proctor; Practice.*

2. For a report of the law officers of the Crown in Canada on this subject. *ibid*, 247, note.

QUEBEC.

For geographical limits of the ancient government of Quebec; for the division into Upper and Lower Canada; their re-union into the Province of Canada; and the division of the latter into the Provinces of Ontario and Quebec, see 2 Stuart, 381.

See *Table of Fees.*

RAFTS.

Rules as to the navigating and anchoring of rafts in any navigable river in Canada (31 Vict. c. 58, s. 2), now R. S. C. c. 79, Art. 27; *ante*, p. 380.

RANSOM.

1. Where it is justifiable under the Prize Act. *The Fanny*, Stewart, 554.

2. The Act 22 Geo. 3, c. 25, and the clauses in the Prize Acts relating to ransom, extend only to vessels captured in war, not to those seized for other causes. *The Patriot*, *ibid*, 350.

REASONABLE AND PROBABLE CAUSE.

1. It is defined as "such a state of facts as would lead a man of ordinary caution and prudence to believe and entertain an honest and strong suspicion that the person is guilty."

The Atalaya, Cook, 234.

RECEIPT IN FULL.

1. A receipt in full is not taken as conclusive in the Court, but is open to explanation, and upon satisfactory evidence may be restrained in its operation. *The Sophia*, 1 Stuart, 219.

2. When receipts and discharges of claims are given by the crew of a vessel, they are not to be taken in the Admiralty as conclusive, and where the settlements and receipts are made under undue and oppressive influences, and without free consent, they ought not to bar an equitable claim for compensation beyond what the crew have received. *The Jane*, *ibid*, 256.

3. In actions by seamen for wages the Court will not, of course, sanction settlements made with parties out of Court unless their proctors are consulted and approve them. *The Thetis*, *ibid*, 363.

See *Proctor; Practice*.

RECEIVER OF WRECKS.

His right to intervene in a case of derelict. *The W. G. Putnam*, Young, 271.

RECOUPMENT.

1. The mate of a vessel is chargeable for the value of articles lost by his inattention, and the amount may be deducted from his wages. *The Papineau*, 1 Stuart, 94.

2. Damages occasioned to the ship by the mismanagement of the pilot may be set off against his claim for pilotage. *The Sophia*, *ibid*, 96.

REGISTRAR AND MERCHANTS.

1. Cases referred to in 1 Stuart: *The Lord John Russell*, 198; *The John Munn*, 266; *The Crescent*, 293; *The Roslin Castle*, 307.

2. Cases referred to in Cook: *The Frank*, 105; *The Atalaya*, 260; *The Barcelona*, 299; *The Celeste*, 76; *The Normanton*, 122.

3. See note to *Elysia A.*, *ante*, p. 42.

4. As to percentage entitled to, upon gross amount of all the money paid into the registry. *The Hiram*, Stewart, 583.

5. As to objections to report of referee. *The James Fraser*, Young, 160.

REGISTRATION.

Of mortgages and bill of sale, see *The W. E. Wier*, Young, 145.

RE-OPENING OF DECREE.

1. The *S. B. Hume*, having been picked up derelict by the *G. P. Sherwood*, was, after much risk and exertion, brought into port. The values of vessel and cargo were appraised by competent persons at \$9,000, and this was acquiesced in by the proctors of both parties. As the services were highly meritorious, one-half, \$4,500, was awarded as salvage. Subsequently the proctors for the owners of the vessel obtained a rule to set aside the judgment and award of salvage, on the ground that their acquiescence in the appraisalment had been given under a misapprehension of the facts and of the purpose to which it was to have been applied. The appraisalment had not been made at the instance of the Court. The owners having refused to pay the amount awarded, thereby rendering a sale necessary, and it clearly appearing that a sum far less than the appraisalment would be realized at such sale, and that therefore the award would be excessive and unjust, the Court set aside its judgment and ordered a sale to be had. At the sale the vessel and cargo brought only \$4,128, instead of \$9,000, as had been appraised. *Held*, That the decree should be re-opened, and that the Court should take the \$4,128 as the basis of salvage award, the same proportion being awarded to the salvors as before, with costs. *The S. B. Hume*, Young, 228.

2. The steamer *Z.*, bound from Antwerp to Philadelphia, fell in with the *R. A.*, abandoned, and in twenty-four hours, with little difficulty, towed her into Halifax. The *Z.* was valued at \$275,000 for vessel and cargo, the *R. A.* at \$8,300. *Held*, That \$2,800 should be awarded. Subsequently it was discovered that the appraisalment had been misunderstood, and that it should have been construed so as to make the total value of the *R. A.* only \$7,500. *Held*, That although the counsel for the *R. A.* had acquiesced in the appraisalment and decree until the error was discovered, yet that they were not shut out from applying for relief, that the decree should be re-opened and an award made on the basis of \$7,500, the same proportion being allowed to the salvors.

Recent cases upon the question of re-opening decrees cited, and the rule indicated. *The Royal Arch*, Young, 260.

RELEASE.

1. Witnesses examined under a release. *The Lord John Russell*, 1 Stuart, 194.

RES JUDICATA.

1. Defence grounded on a *res judicata* must be specially pleaded. *The Agnes*, 1 Stuart, 53.
2. Where there had been a previous judgment in the Trinity House upon the same cause of demand, the Court declined to exercise jurisdiction. *The Phæbe*, *ibid*, 59.
3. A Court of competent jurisdiction having decided the facts which were directly in issue, the party is estopped from trying the same facts again. *ibid*.

RESPONSIBILITY

Of master for acts of servant. *The Wampatuck*, Young, 83.

REVENUE CASES.

See *Forfeitures*.

RIGHT OF RETENTION.

See *Maritime Lien*.

RIVERS, ETC.

See *Navigation*; also *ante*, p. 372.

ROTHERY (H. C.)

Registrar of High Court of Admiralty: his letter to Lord Selborne. Cook, 294, note.

RULES OF PRACTICE.

See *Practice*; also *ante*, p. 413, for the present practice of the Court.

RULES OF THE SEA.

1. It is a generally received opinion among seamen that it is imprudent and improper to anchor directly ahead or directly astern of another vessel in the direction of the tides or prevailing winds, unless at such or so great a distance as would allow time for either vessel to take measures to avoid collision in the event of either driving from her anchors. *The Cumberland*, 1 Stuart, 79.
2. It is, moreover, the usual practice not to anchor near to and directly in another's hawse; that is, directly or ahead, and in the direction of the wind and tide; and in books which treat on seamanship it is mentioned as a thing to be avoided, not only to prevent accidents from driving in bad weather, but also in order that

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either vessel may be able to get under weigh without risk of collision with the other. *ibid.*

3. It is a rule universally received among seamen, and to be found in books on seamanship, that, when there is doubt, the vessel on the port tack is to bear up or heave about for the vessel on the starboard tack. *The Nelson Village, ibid, 157.*

See *ante*, p. 372, for present rules of navigation.

4. When a ship is in stays, or in the act of going about, she becomes for the time unmanageable, and in this case it is the duty of every ship that is near her to give sufficient room. *The Leonidas, ibid, 229.*

5. When a ship goes about very near to another, it is her duty to give a preparatory indication, from which that other can, under the circumstances, be warned in time to make the necessary preparations for giving room. *ibid.*

6. When two vessels are approaching each other, both having the wind large, and are approaching each other so that if each continue her course there would be danger of collision, each should port helm, so as to leave the other on the larboard side in passing. *The Niagara, 1 Stuart, 315.*

7. But it is not necessary that because two vessels are proceeding in opposite directions, there being plenty of room, the one vessel should cross the course of the other in order to pass her on the larboard. *ibid.*

8. It is the duty of every vessel seeing another at anchor, whether in a proper or improper place, and whether properly or improperly anchored, to avoid, if practicable and consistent with her own safety, any collision. *The John Munn, ibid, 266, note.*

9. One who has the management of a ship is not allowed to follow that rule to the injury of the vessel of another, when he could avoid the injury by a different course. *The Niagara, ibid, 323; The Elizabeth, ibid.*

10. For rule as to ships meeting each other, see Merchant Shipping Act, 1854, s. 296. *The Inga, 1 Stuart, 335.*

This is now governed by the English rules of 1884.

See 9 P. D., p. 248.

11. Where two ships, close-hauled, on opposite tacks, meet, and there would be danger of collision if each continue her course, the

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one on the port tack shall give way, and the other shall hold her course, unless by so doing she would cause unnecessary risk to the other. *The Mary Bannatyne, ibid*, 353.

12. Nor is the other bound to obey the rule, if by so doing she would run into unavoidable or imminent danger; but if there is no such danger, the one on the starboard tack is entitled to the benefit of the rule. *ibid*.

13. The law imposes on a vessel having the wind free the obligation of taking proper measures to get out of the way of a vessel close-hauled. *The Anne Johanne, 2 Stuart*, 43.

14. Where two vessels are approaching each other on opposite tacks, each being close-hauled, the vessel on the starboard tack should keep on her course, and the vessel on the port tack should keep off. *The Liberty, ibid*, 102.

15. The only exception to the rule is, that if the vessel on the port tack is so much to windward that, in case both persist, the vessel on the starboard tack will strike her to leeward and abaft the beam, then the vessel on the starboard tack must give way, as she can do it more easily than the other.

Dana's Seaman's Friend (London ed. 1864), p. 59.

16. The same rules of navigation, and the same precautions for avoiding collisions and other accidents, as are adopted in the United Kingdom and other countries, are also adopted in respect of vessels navigating Canadian waters by 31 Vict. c. 58, now R. S. C. c. 79. *ante*, p. 372.

SALE.

1. Sale of ship has not the effect of discharging seamen from their engagement. *The Scotia, 1 Stuart*, 160.

2. Of a vessel, during time of war, proved fraudulent. *The Gustava, Stewart*, 541.

SALVAGE.

1. Persons acting as pilots are not to be remunerated as salvors. *The Adventurer, 1 Stuart*, 101.

2. Under extraordinary circumstances of peril or exertion, pilots may become entitled to an extra pilotage, as for a service in the nature of a salvage service. *ibid*.

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3. Such extra pilotage decreed to a branch pilot for the river St. Lawrence for services by him rendered to a vessel which was stranded at Mille Vaches, in the river St. Lawrence, on her voyage to Quebec. *ibid.*

4. In a case of wreck in the river St. Lawrence (Rimouski), the Court has jurisdiction of salvage. *The Royal William*, 1 Stuart, 107.

5. In settling the question of salvage, the value of the property and the nature of the salvage service are both to be considered. *ibid.*

6. The circumstances of the case examined, and the service declared to be a salvage service, and not a mere *locatio operis*, though an agreement upon land was had between the parties in relation to such service. *ibid.*

7. Salvors have a right to retain the goods saved until the amount of the salvage be adjusted and tendered to them. *ibid*, 111.

8. Compensation decreed to seamen out of the proceeds of the material saved from the wreck by their exertions. *The Sillery*, 1 Stuart, 182.

9. Seamen, while acting in the line of their strict duty, cannot entitle themselves to salvage; but extraordinary events may occur, in which their connection with the ship may be dissolved *de facto*, or by operation of law, or they may exceed their proper duty, in which cases they may be permitted to claim as salvors. *The Robert and Anne*, 1 Stuart, 253.

10. Whether, when a merchant ship is abandoned at sea *sine spe revertendi aut recuperandi*, in consequence of damage received and the state of the elements, such abandonment taking place *bona fide* and by order of the master, for the purpose of saving life, the contract entered into by the mariners is, by such circumstances, entirely put an end to; or, whether it is merely interrupted, and capable, by the occurrence of any and what circumstances, of being again called into force. *The Florence* (in note to *Robert and Anne*), 1 Stuart, 254.

11. Salvage allowed by Judge Kerr to the chief and second mates, and carpenter, for their meritorious services, out of the proceeds arising from the sale of the articles saved from the wreck. *The Flora*, 1 Stuart, 255.

(Salvage.)

12. In a case of very meritorious service rendered by two seamen and two young men to a vessel in the river St. Lawrence, the Court awarded one-sixth part of the property saved, and also their costs and expenses. *The Electric*, 1 Stuart, 330.

13. The *Palmyra*, sunk in the river St. Lawrence, was raised and saved by the very ingenious, novel, and excellent machinery on board of the *Dirigo*, and the great skill and experience of the master and crew, most of whom were picked men and excellent mechanics. The Court directed that £1,000 sterling was a reasonable salvage. *The Palmyra*, 2 Stuart, 4.

14. Upon a valuation of £6,700? the sum of £400, awarded as salvage to a schooner for towing a vessel disabled in her masts and rigging in the lower part of the St. Lawrence to a place of safety, the mere *quantum* of service not being the criterion for a salvage remuneration. *The Royal Middy*, 2 Stuart, 82.

15. It seems to be the general sense of the maritime world that the rate of salvage in cases of derelict should not, in ordinary cases, range below one-third, nor above a moiety of the property. *The Marie Victoria*, 2 Stuart, 109.

16. In a case of a very meritorious service rendered by five seafaring persons to a vessel which was discovered by them in the river St. Lawrence, deserted by the crew, the Court awarded one moiety of the property saved, and also their costs and expenses. *ibid.*

17. Where the master and crew of a vessel were taken off by salvors in canoes, the former abandoning her under the apprehension that she would be a total wreck, but was afterwards saved by the meritorious exertions of the latter, a moiety of net value of ship and cargo was allowed as salvage. *The Pride of England*, 2 Stuart, 189.

18. While a vessel floating amidst the ice of the St. Lawrence, without any person on board, and without a rudder, her master and crew having left her, but intending to return, four persons went out to her in canoes, and, by aid of her sails, grounded her in a place of safety. £200 sterling allowed as salvage. *The Pomona*, 2 Stuart, 182.

19. The Vice-Admiralty Courts have jurisdiction in respect of salvors of any ship, or of life, or goods therefrom (26 Vict. c. 24, s. 10). Stockton, *ante*, p. 356.

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20. Derelict being *sine spe recuperandi*, is distinguished from salvage in the amount awarded. *The Marie Victoria*, 2 Stuart, 109.

21. Rules as to salvage prevailing in the High Court of Admiralty obtain also in the Courts of Vice-Admiralty. *ibid.*

22. Where the master of a steamer exacted an exorbitant contract for salvage service from the master of a sailing vessel which, with the mate alone on board, was in imminent danger of shipwreck, the same was set aside and a *quantum meruit* allowed. *The America*, 2 Stuart, 214.

23. The ship *Scotswood*, meeting with tempestuous weather, became waterlogged and completely disabled, the provisions, compasses and charts being washed away. In this condition she was found by the *F. W. Brown*, a fishing schooner, which, in response to signals of distress, came alongside and took off the captain and crew of the ship, putting nine of her own men on board in their place. The captain and crew of the ship never attempted to rejoin her again, but remained on board the schooner until port was reached. The heavy weather still continuing, the schooner was unable to manage the ship, and the following day, on another schooner, the *Laura*, coming near, they hailed one another, and, after consultation, it was decided that each schooner should send seven men on board the ship, and that then both should take her in tow. After great exertion on the part of both crews, the ship was on the next day brought into port. The evidence was not conclusive as to the intention of the master of the *Scotswood* to finally abandon her, but the salvage services rendered being highly meritorious, this was not considered a point of much importance. *Held*, That two-fifths of the appraised value of ship and cargo should be awarded as salvage, to be divided equally between the two schooners, the owners of the schooners to receive one-half the amount falling to each. The cases reviewed as to the rate of salvage in causes of derelict and the vitiating of insurance by deviation to save property. *The Scotswood*, Young, 25.

24. This vessel, having been abandoned at sea while on a voyage from Quebec to London, was found in a water-logged condition by the *A. W. Singleton* off the coast of Newfoundland. The mate and four seamen of the latter vessel took charge of the derelict and brought her into the port of Sydney. It was a very meritorious case, the salvors having run considerable risk and endured great

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hardship. The value of the derelict was appraised at \$30,000. *Held*, That the sum of \$8,000 should be awarded as salvage, of which the mate received \$1,000, and the four other salvors \$500 each, \$3,200 being allowed to the owners of the ship. *The Canterbury*, Young, 57.

25. A vessel, while passing down the Gulf of St. Lawrence, struck on a reef, lost her rudder, and became utterly unmanageable. In this condition she was found by the salvors, who, responding to signals of distress, took the crew off and landed them in Sydney, Cape Breton, then returned to the *Regina*, and, after considerable exertion, brought her into the same port. The net proceeds of ship, stores and cargo were \$7,105. *Held*, That the salving schooner should receive \$500, and the ten seamen on board her \$200 each. Directions given as to proper method of executing appraisement of ship and cargo. *The Regina*, Young, 107.

26. A schooner found by fishermen floating on her beam ends and entirely deserted was, after considerable exertion, requiring the united efforts of thirty-two men, successfully brought into harbor. The sale of ship and cargo realized \$954.60. *Held*, That the salvors should be paid out of that sum \$153 for their labor, and \$9 apiece as salvage, making \$441 in all. *The S. V. Coonan*, Young, 109.

27. An abandoned vessel was discovered by the keeper of a lighthouse, who hailed a steam-tug and directed her to the vessel. The steam-tug then brought her into port. The value of vessel and cargo was agreed upon at \$2,250. *Held*, That the steam-tug should receive \$450, and the lighthouse-keeper \$25. *The Aston*, Young, 136.

28. A fishing schooner, while returning from the grounds with a full cargo, fell in with a derelict, and taking her in tow, brought her into port, remaining in possession until relieved by an officer of the Court. A delay of twelve days was thus occasioned on her home voyage. *Held*, That one-third the value of derelict and cargo should be awarded as salvage. *The Tickler*, Young, 166.

29. The ship was found derelict by the mail steamship *Abyssinia*, and the third officer, with fifteen of the steamer's crew, after two days' extreme exertion and considerable personal risk, succeeded in bringing her safely into the port of Halifax. Appraised value of ship and cargo, \$101,936; \$30,000 awarded as salvage. *The R. Robinson*, Young, 168.

(Salvage.)

30. The steamer *Naples*, with a valuable cargo, bound from Philadelphia to Liverpool, fell in with the *Ida Barton*, derelict, about 320 miles from Halifax, and towed her to that port in forty-eight hours, breaking and spoiling several hawsers in so doing. There was no special merit in the services rendered. *Held*, That the salvors should receive one-half the appraised value of ship and cargo, all costs and charges to be deducted from the other half, and that the owners of the steamer should take one-half of the salvage awarded. The rule as to salvage on derelict stated and cases reviewed. *The Ida Barton*, Young, 240.

31. The steamer *Zealand*, bound from Antwerp to Philadelphia, fell in with the *Royal Arch*, abandoned, and in twenty hours, with but little difficulty, towed her into Halifax. The *Zealand* was valued at \$275,000 for vessel and cargo, and the *Royal Arch* at \$8,300. *Held*, That \$2,800 should be awarded. *The Royal Arch*, Young, 260.

32. The maximum charge for salvage award is a moiety of the *res* saved, and Wrecking Companies are governed by the law of salvage the same as ordinary vessels. *The International Wrecking, etc., Co. v. Lobb*, 11 O. R. 408; s. c. 22 Can. L. J. 106.

33. The *W. G. Putnam*, bound from Quebec to Marseilles, was abandoned off the coast of Cape Breton, being completely waterlogged. Her crew reached land the same day, and the day following a small steamer, manned by the salvors, went out in search of the derelict. They found her about forty miles from North Sydney, and, with little difficulty, towed her into that port. The value of ship, cargo and freight was estimated by agreement at \$20,000, and the value of the salving steamer was alleged to be \$4,000. *Held*, That the salvors should receive \$2,500. The receiver of wrecks at Sydney put in a claim for the possession of the ship as against the salvors. *Held*, That there was no ground for the claim. Definition of salvage given. *The W. G. Putnam*, Young, 271.

34. One-half the net proceeds of sale awarded to salvors where no appearance or claim was entered on behalf of owners. *The Architect*, Young, 110.

35. Where no owner appeared to claim goods found derelict, and their value was not great. *Held*, That the salvors should have the full amount they realized after payment of the necessary costs. *Two Bales of Cotton*, Young, 135.

(Salvage.)

36. The salvors of a derelict ship should, in the first instance, give notice to the proctor for the Admiralty, who will forthwith extract a warrant. After the issue of the derelict warrant, the salvors should move for leave to intervene. If the case be one of only trivial importance, the Court will then direct the filing of affidavits in proof of claims, etc. In cases of greater moment, it will sanction an act on petition with the usual pleadings, and proof under the rules of 1859; and when there are claims represented by several proctors, or subsequent to each other, a consolidation will be ordered, as in other cases of salvage. If a private warrant be extracted in the interim between giving notice to the Admiralty proctor and his taking proceedings, it will be disallowed on taxation. *The Sarah*, Young, 102.

The procedure is now governed by the Rules of 1893, *ante*, p. 413.

37. A vessel, while on a coasting voyage, put into harbor for the night on account of heavy weather. During the night the wind increased and the vessel dragged her anchors until she struck on the rocks and was placed in circumstances of considerable danger. At this point the claimants tendered their services, and after two hours' labor succeeded in rescuing her from her perilous position and securing her in a place of safety. The evidence was exceedingly contradictory as to how the claimants came on board and the merit of their services, the defendants disputing their claim to the character of salvors. Nevertheless, the defendants paid the sum of \$100 in Court, and the weight of evidence seemed to be with the claimants. *Held*, That the sum of \$200 should be equally divided among the five claimants. *The Silver Bell*, Young, 43.

38. The brigantine *Marino*, on a voyage from Boston to Sydney, encountered a heavy gale, which carried away her rigging and rendered her almost unmanageable, in which condition she drifted along the coast of Nova Scotia for several days, until fallen in with by the steamship *Commerce*, which took her in tow, and after eight or nine hours brought her into Halifax harbor. There was some evidence of an offer of \$500 having been made for the services rendered, but no actual tender in due form was proved. The value of the *Marino* was appraised at \$6,000. *Held*, That the sum of \$800 should be paid for salvage. *The Marino*, Young, 51.

39. The schooner *Margaret*, when in a helpless condition, was fallen in with by the *Alfred Whalen*, and the captain of the latter

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vessel persuaded the *Margaret's* crew to desert her and take to his vessel. He then sailed off, but soon returned, and taking her in tow brought her into port. *Held*, That this did not constitute the *Margaret* a derelict, and therefore somewhat less than one-half the amount claimed was awarded. *The Margaret*, Young, 171.

40. The *Charles Forbes* sailed from a port in the United States bound for Portland, with a cargo of coal. Encountering heavy weather, her cargo shifted, but not to such an extent as to throw her on her beam-ends, nor did she become unmanageable. In this state she was found off the American coast by three American schooners, and abandoned by her master and crew without there being any circumstances whatever to justify such a course. Although many American ports were much nearer, the salvors brought her to Halifax. After the vessel had been taken possession of by the salvors, her master made efforts to return to her, but was prevented by one of the salvors. He then asked them to take the vessel into Portland, her destination, but this was refused. The vessel was appraised at \$21,303, and the cargo at \$4,440. *Held*, That the vessel was not derelict; that the salvors had not acted as they should have done under the circumstances, and that, as there was no substantial service rendered by them, the total salvage should be only \$2,840, to be divided among them, with costs of suit. The captain of one of the salving schooners, who had taken command of the *Charles Forbes*, was held to have so misconducted himself as to forfeit his share of the salvage. The law upon this point reviewed. *The Charles Forbes*, Young, 172.

41. The *Auguste Andre*, a Belgian steamer, sailing between Antwerp and New York, encountered severe weather and had her rudder carried away. She continued her course in that crippled condition until fallen in with by the *Switzerland*, about 175 miles distant from Halifax, who took her in tow and brought her into port after three days' towage. The weather was moderate during all that time, and the services rendered, while extremely opportune and valuable, were not of a highly meritorious character. The values of the respective steamers and their cargoes, freight, etc., were as follows: The *Auguste Andre*, vessel worth \$127,500; cargo, \$122,500; freight, \$3,592. The *Switzerland*, vessel, \$325,000; cargo, \$250,000. *Held*, That \$20,000 should be awarded as salvage, of which \$12,000 should go to the owners, \$1,500 to the master,

(Salvage.)

and the balance among the crew, according to their ratings. The modern decisions cited and reviewed.

The Auguste Andre, Young, 201.

42. The *Herman Ludwig*, on a voyage from New York to Antwerp, broke her shaft when two days out, and the *California*, another steamer, coming up, an agreement was entered into by the master of the disabled steamer to be towed into Halifax, and to pay for the service such amount as should be settled upon by the Admiralty Court at that port. This was accomplished within twenty-four hours without any mishap except the breaking of two hawsers. *Held*, That the service rendered was not a mere towage, but a salvage service, and \$10,000 was awarded therefor, of which \$7,000 went to the owners, and \$750 to the master, the balance to the crew, according to their ratings. The law as to deviation for the saving of property reviewed.

The Herman Ludwig, Young, 211.

43. The barque *Martha*, having run ashore near the mouth of Halifax harbor, was assisted by three neighboring fishermen in getting off again. Substantial service, extending over three days, was rendered. The salvors being, as they considered, inadequately remunerated, applied to the Court, and it was *Held*, That the amount was not sufficient, and that the sum of \$35, \$30 and \$25 should be added to the respective amounts paid into Court for the three salvors, with costs. *The Martha*, Young, 247.

44. The *Rowena*, a brigantine, owned in Prince Edward Island, after passing through the Strait of Canso, went aground on the east point of the Island at low tide. After remaining in that position all night, and having pounded somewhat when the tide rose, but not so as to cause any serious danger, the captain and crew in the morning went ashore to procure assistance. A part of the crew returned to her during the day, but did not remain on board. During the night the vessel floated off, and the following morning was fallen in with by the *Reform*, who sent a crew on board, and brought her to Halifax as a derelict. The captain of the *Rowena* having procured the assistance he sought, returned to where he had left her, after both vessels had gone out of sight. It was contended on the part of the respondents that the *Rowena* was not a derelict; that the salvors had acted improperly in taking the vessel off to Halifax when they knew she belonged to the Island; and that they had forfeited all claim to salvage by embezzling some of the vessel's

(Salvage.)

property. *Held*, That the *Rowena* was not a derelict, but only a case of ordinary salvage; that there was not sufficient proof of the alleged embezzlement, but that the salvors had not acted rightly in taking the vessel so far from her home; and therefore only \$500 was awarded on an appraised value of \$5,000.

The Rowena, Young, 255.

45. Principles and examples in English Courts.

The Stella Marie, Young, 23.

46. The schooner *Thistle* found the ship *Flora* waterlogged and abandoned in the Gulf of St. Lawrence, and after much meritorious exertion brought her into a port in Newfoundland, where she was sold, and realized the sum of \$850. A portion of her materials was brought to Halifax, and was there proceeded against by two of the salvors. *Held*, That the Court had jurisdiction on the ground that salvage constitutes a lien on the goods saved, and the portions coming to the salvors were therefore set off to them and directed to be paid out of the proceeds of the goods brought to Halifax. *The Flora*, Young, 48.

See *Jurisdiction*, 36.

47. One of Her Majesty's troop-ships, having picked up a derelict barque with a valuable cargo, and brought her into port, was not allowed by the Admiralty authorities to receive any allowance by way of salvage. *The John*, Young, 129.

48. One of Her Majesty's men-of-war rendered salvage services to a derelict ship, but was not allowed by the government authorities to make any claim therefor. *The Herman*, Young, 111.

49. This vessel, while on a voyage from St. Pierre to Halifax, stranded on Sable Island. Only a fresh breeze was blowing at the time, and she received no serious injury, but her situation was one of considerable danger if not speedily rescued. Under the master's direction the crew and passengers landed with all their clothes, provisions, etc., but the vessel was not stripped, and the master denied any intention of abandoning her. They all left her for the night, and the following morning the six passengers, taking a boat from the island, boarded the vessel, and without much difficulty, and at no personal risk, succeeded in floating her off, when the master and crew, joining her in their own boat, they completed the voyage in safety. The passengers having taken proceedings to recover salvage, as in case of derelict, the owner of the vessel paid the sum of

(Salvage.)

£40 into Court, which they refused. There was much conflicting testimony upon the points: first, whether the master really intended to abandon or not; and, second, the merit of the salvage services rendered. *Held*, That the tender of £40 was sufficient, but that in view of the conflict of evidence, the parties should pay their own costs. *The Stella Marie*, Young, 16.

50. A foreign ship becoming disabled in the Gulf of St. Lawrence, her crew were taken off by one set of salvors and safely landed at a port in the island of Cape Breton. Subsequently another set of salvors fell in with the ship and brought her into an adjoining port. The services in both cases were highly meritorious and rendered while the disabled vessel was about sixty miles from the nearest land. *Held*, That both sets of salvors were entitled to salvage, and a sale of the ship having been effected for \$2,560, the Court awarded the sum of \$660 to be divided among the salvors of the crew, and \$900 among the salvors of the ship. *The Heindall*, Young, 132.

51. Awards made in the nature of life-salvage to fishermen who had been instrumental in saving many lives from a passenger steamer wrecked upon the coast. *The Atlantic*, Young, 170.

52. A ship was stranded on a rocky shore with a point of rock protruding through her hull. H. was employed to blast it away and so free the ship. *Held*, That this was not a salvage service. (2) That the Vice-Admiralty Court had jurisdiction to award reasonable remuneration in respect to the same. *The Watt* (2 W. Rob. 70) referred to. *The Costa Rica*, 3 E. C. R. 23.

53. A stranded vessel abandoned by the owners to the underwriters, and sold by them, was saved, and was brought by the purchasers to a shipwright for repairs. *Held*, That the towage of vessel from the place where stranded to dry dock was salvage service. (2) Claim for use of anchor, chains, etc., used in saving ship. *Held*, a salvage service. (3) Claim for personal services not performed on vessel. *Held*, not a salvage service. (4) Claim for services of tug in unsuccessful attempt to remove vessel. *Held*, not a salvage service. Salvage is a reward for benefits actually conferred. (5) *Held*, maritime liens take priority of possessory liens to the extent of the value of the *res* at the time of delivery to the shipwright. (6) *Held*, following the usual rule, that not more than a moiety of the value of the *res* at the time when saved should be awarded to salvors, there being no exceptional feature except

(Salvage.)

the small value of the *res*. Costs of salvors awarded out of other moiety. Costs of arrest and sale and of bringing fund into Court paid in priority to claims out of fund, in proportion to the value of the *res* at the time of delivery to the Dry Dock Company, and balance of the proceeds of sale which was not sufficient to pay claim of possessory lien holder. *The Gleniffer*, 3 E. C. R. 57.

54. In a collision between a steamer and a sailing vessel in a fog, the steamer was going half speed. Had she been going dead slow she might have been stopped in time to prevent the collision. *Held*, That the steamer was partly in fault, although the collision was no doubt due to the want of a fog-horn on the sailing vessel. (2) The sailing vessel immediately becoming waterlogged and helpless, and in a position where, though safe for the moment, she might very shortly have been in great danger, it was a salvage service, and not towage merely, to rescue her. (3) Where two vessels in collision are both in fault, salvage services performed by one towards the other are to be divided.

The Zambesi; The Fanny Dutard, 3 E. C. R. 67.

55. A steamship belonging to the Dominion government went ashore on the island of Anticosti, and suppliants rendered assistance with their wrecking steamer in getting her afloat. The service rendered consisted in carrying out one of the stranded steamship's anchors, and in taking a hawser and pulling on it until she came off. For carrying out the anchor it was admitted that the suppliants had bargained for compensation at the rate of \$50 an hour, but whether the bargain included the other part of the service rendered or not was in dispute. The service was continuous, no circumstances of sudden risk or danger having arisen to render one part of the work more difficult or dangerous than the other. *Held*, That the rate of compensation admittedly agreed upon in respect of carrying out the anchor must, under the circumstances, be taken as affording a fair measure of compensation for the entire service. (2) A petition of right will not lie for salvage services rendered to a steamship belonging to the Dominion government. *Couette et al. v. The Queen*, 3 E. C. R. 82.

56. A crew of a fishing schooner had performed certain salvage services in respect of a derelict ship, and gave the following power of attorney respecting the claim for such services to the agent of the owner of the schooner: "We, the undersigned, being all the

(Salvage.)

crew of the schooner *Iolanthe* at the time said schooner rendered salvage services to the barque *Quebec*, do hereby irrevocably constitute and appoint Joseph O. Proctor our true and lawful attorney, with power of substitution for us, and in our name and behalf, as crew of the said schooner, to bring suit or otherwise settle and adjust any claim which we may have for salvage services rendered to the barque *Quebec*, recently towed into the port of Halifax, Nova Scotia, by said schooner *Iolanthe*, hereby granting unto our said attorney full power and authority to act in and concerning the premises as fully and effectually as we might do if personally present, and also power at his discretion to constitute and appoint, from time to time, as occasion may require, one or more agents under him, or to substitute an attorney for us in his place, and the authority of all such agents or attorneys at pleasure to revoke." *Held*, That this instrument did not authorize the agent to receive the salvage payable to the crew, or to release their lien upon the ship in respect of which the salvage services were performed. (2) That payment of a sum agreed upon between the owners of such ship and the agent, and the latter's receipt therefor, did not bar salvors from maintaining an action for their services. *The Quebec*, 3 E. C. R. 33.

57. The lien of salvors upon property saved by their exertions is personal and inalienable. *The City of Manitowoc*, Cook, 178.

See *Maritime Lien*, 7.

58. An assignment by salvors, for a valid consideration, of a sum due them for salvage, does not so vest in their assignees as to enable the latter to proceed *in rem* in their own names. *ibid*.

59. A steam vessel, while on fire in the lower St. Lawrence, derelict, was partially saved by a steam tug, which towed her to the shore, where she was beached, and afterwards sold by decree. The salvors declared entitled to one-third of the proceeds of sale and their costs, and the award distributed among them. *The Progress*, Cook, 308.

60. A steam-tug engaged to tow a ship can claim for services to such ship if she incurs a risk or performs a duty outside the scope of her original engagement, and when she has been freed from the obligations under which she is placed by her original contract, as by a *vis major*, or by accidents not contemplated when the contract was entered into. *The Victory*, Cook, 335.

(Salvage.)

61. The tug cannot claim if the ship has been brought into a dangerous position by the fault of the tug, on the principle that a vessel, so to speak, cannot profit by her own wrong. *ibid.*

62. Where a vessel with a valuable cargo was stranded on a dangerous place near Cape Rosier, salvage services were rendered by a passing steamer, *Held*. That as there was no danger to life or property incurred by the salving steamer in aiding to get her off, the sum of \$1,000 was an adequate remuneration. *The Carmona*, Cook, 350.

63. A tender of the above amount after suit brought without costs declared insufficient. *ibid.*

64. The *Palmerin*, a screw steamship of 1725 tons register, valued at £19,500 sterling, when on a voyage from Montreal to Cape Breton, broke her shaft off the Bird Rocks. The SS. *Nestorian*, valued, with her cargo and freight, at £57,000 sterling, bound from Montreal to Glasgow, took the *Palmerin* in tow, and towed her safely to Sydney. In doing so the *Nestorian* deviated from her voyage, but incurred no special risk. The towage lasted twenty hours. £1,150 sterling allowed as salvage remuneration. *The Palmerin*, Cook, 358.

65. Salvage means rescue from threatened loss or injury. No danger, no salvage. If the ship be in danger, then the rescuers earn a salvage reward, which, on the grounds of public policy, is to be liberal, but yet varies according to the imminence of the danger to the ship on the one hand, and the skill and enterprise and danger of the salvors on the other hand.

(2) A small packet steamer, while performing one of her regular trips between certain points in thick weather, discovered a large steamship lying at anchor in such a position as to be in imminent danger of becoming a total loss. The latter signalled the former and asked to be towed into port. This the packet steamer refused to do, wishing to prosecute her voyage, but agreed to tow the ship out of her dangerous position into the open sea, and thus give her master directions to enable him to make his port of destination. This offer was accepted and acted upon. In conducting the ship to the open sea the packet steamer performed the service both of a pilot and tug, and showed skill and enterprise, and incurred appreciable risk while so engaged. *Held*, to be a salvage, and not a mere towage service.

(Salvage.)

Semble, While the Court is disposed to confine the claims of professional pilots and tugs to the tariff scale for such professional services, a volunteer ought to be allowed a more liberal rate of compensation. *The C. F. Sargent*, 3 E. C. R., 332.

66. The St. C. having sailed from St. John, N. B., with a cargo of deals, bound for Liverpool, went ashore at Dipper Harbor, about twenty-five or thirty miles below St. John. The ship's agents at the latter place engaged two tugs, the S. K. and the L., to go down and pull her off. For this service they were to receive an agreed sum, and the S. K. was to receive a further sum, in case the vessel was got off, for towing her back to St. John. When the tugs reached the vessel it was found that more men and appliances were needed, and the S. K. returned to St. John for a steam pump and other appliances. The L., at the request of the master of the vessel, remained to tend on the ship. During the absence of the S. K. the vessel was floated, and through the exertions of the L. the ship was prevented from going on the rocks. *Held*, That the services rendered were more than towage services, and that the L. was entitled to salvage reward. *The St. Cloud*, Stockton, 140.

67. A salvage service having been rendered a foreign vessel, which had gone ashore near Point Escuminac, near Miramichi Bay, in an action for the recovery of the amount of such service. *Held*, That the costs should be paid first out of the fund in Court, then the amount awarded as salvage services, and any balance to the owners, as the seamen had been paid. *The Nordcap*, *ibid*, 172.

68. Two vessels—the F. and the A.—were moored to a buoy on the north of the harbor of St. John, N. B. They were fastened together, and during the night broke loose by reason of the buoy becoming detached from its mooring, and they drifted bow foremost down the harbor. All on board the vessels were asleep. The plaintiffs' tug gave the alarm to those on board the vessels, and, by fastening on to the A., towed both vessels out into the harbor and left them in a place of safety. *Held*, That the services rendered under the circumstances were salvage services, and although the tug had not, in fact, fastened a line to the F., yet salvage services had been rendered her, for which she was liable, and that the owners of the tug could proceed separately against the F. without joining the A. in the action. *The Frier*, *ibid*, 180.

(Salvage.)

69. It is perfectly competent for salvors, instead of leaving the amount of remuneration to be determined by the Court, to agree with the master of the vessel in distress to render the required assistance for a specified sum. *The Marion Teller*, Cassel's Dig. 521.

See *Derelict*.

70. For rescue by the crew, one-sixth allowed for salvage; but the King's ships not entitled to any salvage for performing their ordinary duty. *The Walker*, Stewart, 105.

71. The property of enemies protected by a license is liable to pay for salvage services rendered by a British ship. No salvage due for rescuing a vessel which had been seized for a breach of the laws of its own country. *The Abigail*, *ibid*, 355.

SALVORS.

As to conduct of, see *The Rowena*, Young, 255; *The Charles Forbes*, *ibid*, 272; *The St. Cloud*, *ante*, 153, note; also *ante*, pp. 172, 184. See *Salvage*.

SEAMEN.

1. If a seaman be disabled in the performance of his duty, he is to be cured at the expense of the ship; but if the injury which he sustained be produced by drunkenness on his part, he must bear himself the consequences of his own misconduct. *The Atlantic*, 1 Stuart, 125.

2. Abandoning seamen, disabled in the service of the ship, without providing for their support and cure, equivalent to wrongful discharge. *ibid*.

3. The seaman owes obedience to the master, which may be enforced by just and moderate correction; but the master, on his part, owes to the seaman, besides protection, a reasonable and direct care of his health. *The Recovery*, 1 Stuart, 130.

4. Where a seaman can safely proceed on his voyage, he is not entitled to his discharge by reason of a temporary illness. *The Tweed*, 1 Stuart, 132.

5. Mere sickness does not determine the contract of hiring between him and the master. *ibid*, 133.

6. Seamen going into hospital for a small hurt not received in the performance of their duty not entitled to wages after leaving the ship. *The Captain Ross*, 1 Stuart, 216.

(Seamen.)

7. Mariners, in view of the Admiralty law, are *inopes consilii*, and are under the special protection of the Court.

The Jane, 1 Stuart, 258.

8. The jealousy and vigilance and parental care of the Admiralty, in respect to hard dealings, under forbidden aspects, with the wages of mariners. *ibid.*

9. The Court of Admiralty has power to moderate or supersede agreements made under the pressure of necessity, arising out of the situation of the parties. *ibid.*

10. While acting in the line of their strict duty, they cannot entitle themselves to salvage. *The Robert and Anne*, 1 Stuart, 253.

11. For services beyond the line of their appropriate duty, or under circumstances to which those duties do not attach, they may claim as salvors. *ibid.*

12. Seamen are regarded as essentially under tutelage, and every dealing with them personally by the adverse party, in respect to their suits, is scrutinized by the Court with great distrust. *The Thetis*, 1 Stuart, 365.

13. Negotiations with them, even before suit is brought, more to the satisfaction of the Court when entrusted to their proctors. *ibid.*

14. A seaman is entitled to his costs as well as his wages, and a settlement after suit brought, obliging him to pay his own costs, is in fact deducting so much from his wages. *ibid.*

See *Practice; Costs*.

15. Articles not signed by the master, as required by the General Merchant Seaman's Act (7 & 8 Vict. c. 112, s. 2), cannot be enforced. *The Lady Seaton*, 1 Stuart, 260.

The Merchant Shipping Act, 1854, and amending Acts, now govern agreements with seamen.

16. A promise made by the master at an intermediate port on the voyage to give an additional sum, over and above the stipulated wages in the articles, is void for want of consideration. *The Lockwoods*, 1 Stuart, 123.

17. Change of owners, by the sale of the ship at a British port, does not determine a subsisting contract of the seamen, and entitle them to wages before the termination of the voyage. *The Scotia*, 1 Stuart, 160. See *Sale*.

(Seamen.)

18. Where a voyage is broken up by consent, and the seamen continue under new articles on another voyage, they cannot claim wages under the first articles subsequent to the breaking up of the voyage. *The Sophia*, 1 Stuart, 219.

19. Whether, when a merchant ship is abandoned at sea *sine spe revertendi*, in consequence of damage received and the state of the elements, such abandonment taking place *bona fide* and by order of the master, for the purpose of saving life, the contract entered into by the mariners is by such circumstances entirely put an end to; or whether it is merely interrupted, and capable, by the occurrence of any and what circumstances, of being again called into force. *The Florence*, 1 Stuart, 254, note.

20. Where seamen shipped for "a voyage from the port of Liverpool to Constantinople, thence (if required) to any port or places in the Mediterranean or Black Seas, or wherever freight may offer, with liberty to call at a port for orders, and until her return to a final port of discharge in the United Kingdom, or for a term not to exceed twelve months," and the ship went to Constantinople in prosecution of the contemplated voyage, and then returned to Malta, whence, instead of going to a final port of destination in the United Kingdom, she came direct to Quebec in search of freight, which she failed to obtain at the ports at which she had previously been, it was *Held*, That coming to Quebec could not be considered a prosecution of the voyage under the 94th section of the Mercantile Marine Act of 1850, re-enacted by the 190th section of the Merchant Shipping Act, 1854. *The Varuna*, 1 Stuart, 357.

21. The words "nature of the voyage" must have such a rational construction as to answer the leading purposes for which they were framed, viz., to give the mariner a fair intimation of the nature of the service in which he engages. *ibid*, 361, note.

22. The words "or wherever freight may offer" are to be construed with reference to the previous description of the voyage. *ibid*, 360.

23. The words "or elsewhere" must be construed either as void for uncertainty, or as subordinate to the principal voyage stated in the preceding words. *ibid*, 361.

24. Where seamen were shipped for a voyage from London to Quebec and back to the port of London, *Held*, That the nature of the voyage thus stated was a sufficient intimation to the mariner

(Seamen.)

of its duration, and a substantial compliance with the provisions of the Merchant Shipping Acts, 1854 and 1873. *The Red Jacket*, Cook, 304.

See *Mariner's Contracts; Wages*.

SEAMEN'S WAGES.

1. In the course of a voyage the master promises the seamen an additional sum over and above the stipulated wages in the articles. This promise is void for want of consideration. *The Lockwoods*, 1 Stuart, 123.

See *Mariner's Contract; Seamen; Wages; Receipt in Full; Desertion*.

2. Special contract for. *The City of Petersburg*, Young, 1.

See *Wages*, 23.

SECURITY FOR COSTS.

1. A collision took place in New York Bay between *The Mary and Carrie*, an American registered vessel, and *The Oakfield*, a steamship registered at the port of Glasgow, Great Britain. The plaintiff, a resident of the city of New York, United States, and owner of the American vessel, caused *The Oakfield* to be arrested in a cause of damage by collision at St. John, N. B., by process issued out of the registry of the New Brunswick Admiralty District. The defendants applied for security for costs, on the ground that the plaintiff was a non-resident. The plaintiff by affidavit declared his intention to remain within the jurisdiction until his suit was finally heard and determined, and resisted the application, relying on *Redondo v. Chaytor*, 4 Q. B. D. 453. Counsel for defendants contended that Order 65, rule 6, of the English Judicature Act, 1883, applied, and that under the Canadian Admiralty rules of 1893, Order 65 of the English High Court must govern. The case of *Michiels v. The Empire Palace, Ltd.*, 66 L. T. 132; 8 Times, L. R. 378, was pressed. Held by Tuck, J., that there must be a stay of proceedings until security to the amount of \$300 was given. The learned judge, in the course of his judgment, stated that under the authority of *Redondo v. Chaytor* he would have refused the application, notwithstanding Order 65, had it not been for the decision of *Michiels v. The Empire Palace, Ltd.* *The Oakfield*, August 31, 1894 (not yet reported).

Rule 134 of 1893 would appear to govern in a case of this kind.

See *Costs*. See *ante*, p. 128, note.

SHIP.

See *Interpretation of Terms*.

SHIP'S ARTICLES.

See *Mariner's Contract; Seamen; Wages*.

SHIPWRECKS.

See *Acts of Parliament*, 14.

SICKNESS.

See *Seamen: Wages*.

SLAVE TRADE.

1. An American vessel condemned. *The Merced*, Stewart, 205.

2. It is not necessary to have slaves on board; it is sufficient if the trade is incipient, progressive, or complete; it may be proved by the nature of the vessel and cargo in opposition to the positive oath of the master. *The Severn*, *ibid*, 284.

SOLICITOR GENERAL.

See *Attorney General*.

SMUGGLING.

It forfeits the vessel though the owner be innocent. *The Seaway*, Young, 267.

STARBOARD.

Probable derivation of this nautical term. 1 Stuart, p. 235.

STATUTE.

1. The repeal of a repealing statute has generally the effect of reviving the original statute. *The London*, 1 Stuart, 151.

By Con. Stat. c. 120, s. 5, of New Brunswick, it is provided that no Act or portion of an Act heretofore or hereafter repealed shall be revived unless by express enactment.

2. A statute does not lose its force by desuetude or non-user. *The Mary Campbell*, *ibid*, 223.

For list of Statutes, see *Index, post*.

STAYS.

See *Collision*, 25, 104.

STEAMER.

1. If it be practicable for a steamer, which is following close upon the track of another, to pursue a course which is safe, and she adopts one which is perilous, then, if mischief ensue, she is answerable for all consequences. *The John Munn*, 1 Stuart, 265.

2. In a cause of collision between two steamers, the Court, assisted by a captain in the Royal Navy, pronounced for damages and costs, holding that the one which crossed the course of the other was to blame. *The By-Town*, *ibid*, 278.

3. Making short and unusual turns to cross the course of another steamer coming into port, contrary to the usual practice and custom of the river, and the rules of good seamanship, condemned in damages. *The Crescent*, *ibid*, 289.

4. Such dangerous manœuvres in a crowded port like that of Quebec to be discountenanced. *ibid*.

5. Steamers are to be considered in the light of vessels navigating with a fair wind. *The Niagara*, *ibid*, 314.

6. Every steamship when navigating any narrow channel shall, whenever it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard of such steamship. The Merchant Shipping Act, 1854. *The Inga*, *ibid*, 335.

7. When two or more steamboats of unequal speed shall be pursuing the same course within the limits of the port of Quebec, the slowest boat, if ahead, shall draw on the left and allow the one at the stern to pass on the starboard side.

See *By-law of Trinity House of Quebec of 12th of October, 1855*.

8. The passenger steamer S., sailing up the river St. John, met the steam-tug N. coming down, near Akerley's Point, where the river is about half a mile wide. The S. was near the western shore, which was on her port side going up; the N. about one hundred and fifty yards from the same side of the river. The S., by keeping her course when she first sighted the N., might have avoided the collision, but instead ported her helm, which gave her a diagonal course to starboard towards the east side, and as a result struck the N. on the starboard quarter and sank her. *Held*, That the S. was to blame, and liable for the damages sustained; also held that where two vessels are meeting end on, or nearly so, the rule to port helm may be departed from, when there is reasonable ground for believing such course is necessary for safety, and consequently the

(Steamer.)

N. was not to blame, immediately before the collision, for putting her helm to starboard.

The Soulanges; *The Neptune*, Stockton, *ante*, p. 1.

9. A vessel may take a course opposed to that indicated by the rule where there is reasonable ground for believing such proceeding necessary for her safety or more secure navigation. *ibid.*

10. The tug G. was proceeding up the river St. John, and the tug V. coming down; when near Swift Point they came into collision, and the V. sank. The G., at the time of the accident, was, contrary to the rules of navigation, near the westerly shore on the port side of the vessel; the V. did not exhibit any masthead white light, as required by the regulations. *Held*, That both vessels were to blame; that the collision was occasioned partly by the omission of the V. to exhibit her masthead white light, but principally by the course of the G., and a moiety of the damages was given to the V. with costs. *The General*, *ibid*, 86.

STEAM NAVIGATION ACT.

English Steam Navigation Act (14 & 15 Vict. c. 79). *The Inga*, 1 Stuart, 335.

STEAM-TUG.

1. A sailing vessel running foul of another coming up the St. Lawrence in tow of a steam-tug, condemned in damages. *The Niagara*, 1 Stuart, 308.

2. A vessel in tow, with a head wind and no sails, and fast to a steamer, is powerless to a very great extent, and can only sheer to a certain distance on either side of the course on which she is towed. *ibid.*

3. If the misconduct of those on board the tug be the sole cause of the collision, both the other vessels are exempt from responsibility, and the recourse of the injured vessel is against the tug. *ibid.*

4. The tow is not responsible for an accident arising solely from the mistake or misconduct of the tug. *ibid.*

5. A sailing vessel condemned in damages and costs for putting her helm to starboard and passing to the left of a steam tow boat, thereby causing collision with the vessel in tow, the steamer and her tow coming down the channel nearly or exactly upon a line with the course of the sailing vessel. *The Inga*, 1 Stuart, 335.

DIGEST.

(Steam-tug.)

6. As to liability of a steam-tug for collision between vessels, one of which was towed by the steamer. *The John Counter, ibid*, 344.

7. When the accident arises from the fault of the tow, without any error or mismanagement on the part of the tug, the former is answerable. *ibid*.

8. If both be in fault, both vessels are liable to the injured vessel, whatever may be the responsibility *inter se. ibid*.

9. Steam-tugs employed in an ordinary service of towing merchant vessels are bound to be subservient to the orders of the pilot on board the vessel in tow. *The Anglo-Saxon*, 2 Stuart, 122, note.

10. The master of the tug must implicitly obey and carry out the orders of such pilot, excepting in the case of gross mismanagement on the part of the pilot. *ibid*.

11. A tug and tow are one vessel, and that a steamship. *The F. J. King*, 8 Can. L. T., 159.

12. It was held by the Maritime Court of Ontario that it could not entertain a cause of damage to a tow arising from the negligence of towing vessel when no collision between vessels had occurred. *The Sir S. L. Tilley*, 8 Can. L. T., 156.

See *Collision; Steamer; Towage*.

STEERING AND SAILING RULES.

See *ante*, p. 372.

STEWARD.

1. A steward displaced and punished without cause is not bound to serve as a cook, and may recover his wages. *The Sarah*, 1 Stuart, 87.

STRANDING.

See *Wages*, 7.

STUART (HON. GEORGE OKILL).

Judge of Vice-Admiralty Court of Quebec from 1873 to 1884.

SUPPLETORY OATH.

See *Practice*, 10.

SURROGATES.

1. Validity given to the judicial acts of surrogates who execute the office of judges in the Courts of Vice-Admiralty abroad, during vacancies in the offices of judges of such Courts, whether occasioned by the death, or resignation, or other removals of the said judges. 56 Geo. 3, c. 82 (passed 25th June, 1816).

TABLE OF FEES.

1. Since the passing of the Imperial Act 2 Will. 4, c. 51, the establishment of a table of fees for the Vice-Admiralty Court is exclusively in the Privy Council. *The John and Mary*, 1 Stuart, 64.

2. From 1764 to 1780 there are no records in the Registry of Quebec, or documents, showing what was done in that interval of time in relation to fees. *The London*, *ibid*, 148.

3. The Governor and Legislative Council of the old Province of Quebec, in 1780, passed a temporary ordinance (20 Geo. 3, c. 3) "for the regulation and establishment of fees," including the fees to be taken in the Vice-Admiralty Court, which ordinance was continued by several successive temporary ordinances, the last of which expired on April 25th, 1790. *ibid*.

4. The record of the Court contains no information of the fees taken by the officers in the interval between the expiration of this continued ordinance and the table of fees established under the authority of the judge in 1809, and which was generally acted upon by him down to the passing of the 2 Will. 4, c. 51, and the promulgation of the table of fees of June 27th, 1832. *ibid*.

5. From this period down to the Order in Council of November 15th, 1835, this table of fees was acted on. *ibid*.

6. By 26 Vict., c. 24, authority was given to Her Majesty in Council from time to time to establish tables of fees. See *ante*, p. 358.

7. For present law relating to the establishment from time to time of tables of fees, see Colonial Courts of Admiralty Act, 1890, s. 7. *ante*, p. 391.

8. For table of fees now in force, see *ante*, p. 527.

See *Fees*.

TELEGRAPH CABLE.

See *Collision*, 98.

DIGEST.

TENDER.

1. Where a tender is refused simply on account of more being alleged to be due, it is not necessary that the amount tendered should be in coin. *The British Lion*, 2 Stuart, 114.

2. As to the practice of tender in the Court.

The Marino, Young, at p. 53.

3. Tender where sufficient entitles defendant to costs. See *The Peeress*, Young, at p. 267.

See *Costs*.

TERM PROBATORY.

See *Practice*, 5.

TITLE.

1. The Act 26 Vict. c. 24, s. 10, gave Vice-Admiralty Courts jurisdiction touching the title and ownership of any vessel registered in the possession in which the Court is established. Prior to that Act they had no more than the ordinary jurisdiction possessed by the High Court of Admiralty before the passing of 3 & 4 Vict. c. 65 (1840). See the judgment in *The Australia*, 13 Moo. P. C. 132 (1859) on appeal from Vice-Admiralty Court of Hong-Kong. The jurisdiction is now governed by 24 Vict. c. 10, s. 8. *ante*, p. 349.

TORTS.

See *Admiralty*; *Assault*; *Collision*; *Damages (personal)*; *Jurisdiction*; *Harbor*; *Master*; *Passenger*. Also *ante*, p. 157.

TOWAGE.

1. Jurisdiction as to claims for towage extended by the Vice-Admiralty Courts Act, 1863 (26 Vict. c. 24, s. 10). *ante*, p. 356.

2. Under this Act the Court can enforce the payment of reasonable towage, but has no authority to enforce an agreement to employ a particular tug either for a definite or an indefinite quantity of work. *The British Lion*, 2 Stuart, 114.

3. Where an agreement was made in the Lower St. Lawrence with a tug to tow a ship to Quebec, Montreal, and back to Quebec, *Held*, That the tug, having towed the ship to Quebec and Montreal, her owner could not transfer the contract to another to complete it, and that he could not substitute an inferior tug with additional tow for the purpose. *The Euclid*, Cook, 279.

4. *Quære*: As to the jurisdiction of the Court. *ibid*.

(Towage.)

5. Where negligence was charged against a tug for running her tow aground in an intricate channel in the St. Lawrence, *Held*, That the accident was owing to the increased danger of the navigation at the beginning of winter, and that the immediate cause was the shutting out of lights and the fact of the buoys in the channel being invisible. *The Guelph*, Cook, 321.

6. In the opinion of the Court the tow was to blame for navigating at a dangerous and inclement season without a qualified licensed pilot. *ibid*.

7. Distinction between towage and salvage. *The Herman Ludwig*, Young, 211.

8. As to the authority of the master to enter into an agreement for towage. *The Athabasca*, Cassell's Dig., 522.

9. Two vessels—the F. and the A.—were moored to a buoy on the north of the harbor of St. John, N. B. They were fastened together, and during the night broke loose by reason of the buoy becoming detached from its mooring, and they drifted bow foremost down the harbor. All on board the vessels were asleep. The plaintiffs' tug gave the alarm to those on board the vessels, and, by fastening on to the A., towed both vessels out into the harbor and left them in a place of safety. *Held*, That the services rendered under the circumstances were salvage services, and although the tug had not, in fact, fastened a line to the F., yet salvage services had been rendered her, for which she was liable, and that the owners of the tug could proceed separately against the F. without joining the A. in the action. *The Frier*, Stockton, *ante*, p. 180.

10. A tug-boat was engaged by the charterers of a vessel, the E., to tow her from the harbor of St. John, N. B., through the Falls, at the mouth of the river, beneath a suspension bridge which spans the Falls at a point where the river flows into the harbor. The vessel towed was chartered to carry a cargo of ice from the loading place above the Falls to New York, and the charterers were to employ the tug and pay for the towage services. The tug having waited to take another vessel in tow, together with the E., was too late in the tide, and in going under the bridge the topmast of the E. came into collision with the bridge and was damaged. *Held*, That the Court had jurisdiction to entertain the suit; that the delay of the tug in going through the Falls was evidence of negligence;

DIGEST.

(Towage.)

and the tug and owners were condemned in damages and costs. *The Maggie M.*, *ibid*, 185.

See note to this case, *ante*, p. 189.

11. The owners of tug-boats plying in the harbor of St. John, N. B., entered into an agreement to charge a uniform rate for towage services, and specified the amounts for the different tows. The effect was to materially increase the rates on former years, when there was free competition and cut rates. The plaintiffs' tug, at the request of the H. E. K., rendered to the vessel towage services, and charged the combination rates. The vessel owner offered to pay what he had paid in former years for like services, and refused to pay more, claiming the combination rates were against public policy and illegal. *Held*, That as the charges were reasonable and fair for the services performed, the plaintiffs were entitled to recover the full amount claimed. *The Hattie E. King*, Stockton, *ante*, 175.

See note to this case as to illegal combination in restraint of trade.

See *Steamers*; *Steam-tug*; *Salvage*, 54, 60, 66.

TRADE.

Between enemy's ports by Order in Council, January 7, 1807. Intention not sufficient. *The Express*, Stewart, 292.

TRADE AND NAVIGATION LAWS.

As to seizures for breach of the Trade and Navigation Laws.

See *Customs*; *Revenue Cases*; *Vice-Admiralty Courts*.

TREATY.

1. Under American treaty vessels may go to supply with necessities the vessels employed in fishing upon the coasts of Labrador. *The Fame*, Stewart, 95.

2. The American treaty dissolved all connection with the subjects of the United States. Persons born under the King's allegiance there not entitled to the privileges of British subjects. *The Providence*, *ibid*, 186.

3. A passport not being according to the form of the Swedish Treaty, 1661, a vessel restored, but claimants condemned in costs. *The Stockholm*, *ibid*, 379.

4. To the same effect. *The Gustava*, *ibid*, 541.

5. The treaty of 1818 and fishing rights thereunder. *The White Fawn*, Stockton, *ante* 200.

TRINITY HOUSE.

See *Collision*, 64; *Vis Major*, 2; *Steamer*, 7.

TUG AND TOW.

See *Collision*; *Salvage*; *Steamer*; *Steam-tug*; *Towage*.

UNION JACK.

1. None of Her Majesty's subjects to hoist on their vessels the Union Jack, or any pendants, etc., usually worn on Her Majesty's ships, and prohibited to be worn by proclamation of January 1st, 1801, under a penalty not exceeding £100 (8 & 9 Vict. c. 87).

2. Jurisdiction of the High Court of Admiralty and of the Vice-Admiralty Courts in such cases. 1 Stuart, 427.

UNITED STATES OF AMERICA.

1. Regulations for preventing collisions apply to ships of the United States when navigating the inland waters of North America whether within British jurisdiction or not. Order in Council, November 30, 1864. See 2 Stuart, p. 313.

VICE-ADMIRAL.

1. By letters patent, dated the 19th of March, 1764, General James Murray, then Captain-General and Governor-in-Chief in and over the province of Quebec, was appointed Vice-Admiral, Commissary, and Deputy in the office of Vice-Admiralty in the said province of Quebec and territories therein depending, and in the maritime ports of the same and thereto adjoining, with power to take cognizance of and proceed in any matter, cause or thing according to the rights, statutes, laws, ordinances, and customs observed in the High Court of Admiralty in England.

See Copy of Commission set out. 1 Stuart, 370.

2. By this commission His Majesty introduced into the province of Quebec all the laws of the English Court of Admiralty in lieu of the French laws and customs by which maritime causes were decided in the time of the French government. See report prepared by Francis Maseres, Esq., Attorney General of the Province of Quebec, by order of Guy Carleton, Esq., the Governor of the Province, February 27th, 1769. Mr. Maseres was afterwards Curator Baron of the Court of Exchequer in England.

For a list of the several commissions in continuation of the above down to the present time—the powers in are identical—see 1 Stuart, p. 390.

(*Vice-Admiral.*)

3. For their powers and history, see *The Little Joe*, Stewart, 382, 394.

For a list of Vice-Admirals in Canada from 1872 to 1883, see Cook, 410.

VICE-ADMIRALTY COURT.

1. The first establishment of the Vice-Admiralty Court in Canada took place immediately after the cession of the country to the Crown of Great Britain, and, as early as 1764, a commission, bearing date the 24th of August of that year, was issued by General Murray, appointing James Potts judge of the Court, which commission was superseded by another issued under the Great Seal of the High Court of Admiralty of England of the 28th of April, 1768, and the office has been continued by a succession of commissions down to this time. *The London*, 1 Stuart, 147.

2. By 2 Will. 4, c. 51, s. 6, doubts are removed as to the jurisdiction of the Vice-Admiralty Courts in the possessions abroad, with respect to seamen's wages, pilotage, bottomry, damage to a ship by collision, contempt in breach of regulations relating to His Majesty's service at sea, salvage, and droits of Admiralty. 1 Stuart, 4.

3. In all cases where a ship or vessel, or the master thereof, shall come within the local limits of any Vice-Admiralty Court, it shall be lawful for any person to commence proceedings in any of the suits hereinbefore mentioned in such Vice-Admiralty Court. *ibid.*

4. Notwithstanding the cause of action may have arisen out of the local limits of such Court, and to carry on the same in the same manner as if the cause of action had arisen within the said limits. *ibid.*

5. The Court of Vice-Admiralty in the colonies has a concurrent jurisdiction with the Courts of Record there, in the case of forfeitures and penalties incurred by the breach of any Act of the Imperial Parliament relating to the trade and revenues of the British possessions abroad. See The Customs Consolidation Act, 1853 (17 & 18 Vict. c. 107, s. 183).

Vice-Admiralty Courts were made Courts of Record by 24 Vict. c. 10, s. 14 (1861).

6. So in the case of any penalties and forfeitures incurred by the breach of the Act of the Legislature of Canada consolidating the duties of customs, or by the breach of any other Act relating to

(Vice-Admiralty Court.)

the customs or to trade or navigation, concurrent jurisdiction is given to the Court of Vice-Admiralty with the Courts of Record. (Provincial Stat. 10 & 11 Vict. c. 31, s. 51).

7. So it has jurisdiction in the case of any penalties incurred by the breach of the proclamation of the 1st of January, 1801, prohibiting the use of colors worn in Her Majesty's ships. (8 & 9 Vict. c. 87).

8. The Court cannot, in cases of pilotage, enforce a judgment of the Trinity House upon the same cause of demand.

The Phœbe, 1 Stuart, 59.

9. The jurisdiction of the Court is not ousted by the provincial statute 45 Geo. 3, c. 12, in relation to claims of pilots for extra pilotage, in the nature of salvage for extraordinary services rendered by them. *The Adventurer*, 1 Stuart, 101.

10. In a case of wreck in the river St. Lawrence (Rimouski), the Court has jurisdiction of salvage. *The Royal William*, 1 Stuart, 107.

11. The jurisdiction of the Court as to torts depends upon the locality, and is limited to torts committed on the high seas.

The Friends, 1 Stuart, 112.

12. Torts committed in the harbor of Quebec are not within the jurisdiction of the Court. *ibid.*

13. It has jurisdiction of personal torts and wrongs committed on a passenger on the high seas by the master of the ship. *ibid.*; and *The Toronto*, 1 Stuart, 181.

14. In no form can the Court be made ancillary to give effect to proceedings had before a justice of the peace under The Merchant Seamen's Act. *The Scotia*, 1 Stuart, 165.

15. Has no jurisdiction with respect to claims of material men for materials furnished to ships owned in Canada.

The Mary Jane, 1 Stuart, 267.

16. The Court has undoubted jurisdiction over causes of possession, and will restore to the owner of a British ship the possession of which he has been unjustly deprived.

The Mary and Dorothy, 1 Stuart, 187.

17. By the 240th section of The Merchant Shipping Act, 1854, power is given to any Court having Admiralty jurisdiction in any of Her Majesty's dominions to remove the master of any ship being

(*Vice-Admiralty Court.*)

within the jurisdiction of such Court, and to appoint a new master in his stead, in certain cases. *ibid*, 1 Stuart, 189, note.

18. Suit for the recovery of wages under the sum of £50, referred by justices of the peace acting under the authority of the 17 & 18 Vict. c. 104, ss. 188, 189, to be adjudged by the Vice-Admiralty Court. *The Varuna*, 1 Stuart, 357.

19. The Court of Vice-Admiralty exercises jurisdiction in the case of a vessel injured by collision in the river St. Lawrence, near the city of Quebec. *The Camillus*, 1 Stuart, 383. (This was before the passing of the statute of the Imperial Parliament, 2 Will. 4, c. 51, s. 6, removing doubts as to the jurisdiction).

20. Her Majesty, by commission under the Great Seal, may empower the Admiralty to establish one or more Vice-Admiralty Courts in any British possession, notwithstanding that such possession may have previously acquired independent legislative powers. (30 & 31 Vict. c. 45, s. 16). 2 Stuart, 261.

21. The jurisdiction and authority of all the existing Vice-Admiralty Courts are declared to be confirmed to all intents and purposes, notwithstanding that the possession in which any such Court has been established may, at the time of its establishment, have been in possession of legislative power. *ibid*.

22. Vice-Admiralty Courts have jurisdiction in all cases of breach of regulations and instructions relating to Her Majesty's navy at sea, and in all matters arising out of droits of Admiralty. (26 Vict. c. 24, s. 10). 2 Stuart, 255.

23. The jurisdiction in respect of seizures for breach of the revenue, customs, trade, or navigation laws, or of the laws relating to the abolition of the slave trade, or to the capture and destruction of pirates and piratical vessels, is not taken away or restricted by "The Vice-Admiralty Act, 1863." (26 Vict. c. 24, s. 12). 2 Stuart, 255, 256.

24. Nor any other jurisdiction, at the time of the passing of that Act, lawfully exercised by any such Court. *ibid*.

25. The jurisdiction of the Vice-Admiralty Courts, except where it is expressly confined by that Act to the matters arising within the possession in which the Court is established, may be exercised, whether the cause or right of action has arisen within or beyond the limits of such possession. *ibid*, 256.

(*Vice-Admiralty Court.*)

26. Vice-Admiralty Courts have jurisdiction in respect of seizures of ships and vessels fitted out or equipped in Her Majesty's dominions for warlike purposes, without Her Majesty's license, in contravention of "The Foreign Enlistment Act." (33 & 34 Vict. c. 90, ss. 19 and 20). 2 Stuart, 291, 296.

27. As to their jurisdiction, see *The City of Petersburg*. Young, 1.

28. The jurisdiction of the Admiralty is now governed by the Admiralty Act, 1891. *ante*, p. 402.

See *Admiralty Jurisdiction*; *Jurisdiction*.

VIS MAJOR.

1. If a collision be preceded by a fault, which is its principal or indirect cause, the offending vessel cannot claim exemption from liability on the ground of damage proceeding from a *vis major*, or inevitable accident. *The Cumberland*, 1 Stuart, 78.

2. Where the collision was the effect of mere accident, or that overriding necessity which the law designates by the term *vis major*, and without any negligence or fault in any one, the owners of the injured ship must bear their own loss. *The Sarah Ann*, *ibid*, 301.

3. Where, by moving of the ice-bridge in the harbor of Quebec, a steamer was brought under the bow of a sailing vessel, her walking beam broken, and her machinery injured. *Held*, That the damage was not owing to the contravention of a by-law of the Trinity House, but was caused entirely by a *vis major*, and was the result of inevitable accident. *The Harold Haarfager*, 2 Stuart, 208.

4. The Court will not *ex officio* notice a by-law of the Trinity House at Quebec, but will require legal evidence of its contents and publication. *ibid*.

See *Inevitable Accident*.

VOYAGE.

1. In interpreting the Act of Parliament the words "nature of the voyage" must have such a rational construction as to answer the main and leading purpose for which they were framed, namely, to give the mariner a fair intimation of the nature of the service in which he was about to engage himself when he signed the ship's articles. *The Varuna*, 1 Stuart, 361.

(*Voyage.*)

2. The Merchant Shipping Act, 1873, permits of any agreement with a seaman under the section 149 of the Merchant Shipping Act, 1854, stating the maximum period of the voyage or engagement, and the places or parts of the world (if any) to which the voyage is not to extend instead of stating the nature and duration of the intended voyage or engagement, as by that section required. 2 Stuart, 328.

WAGES.

1. Summary tribunal for the trial of seamen's suits for the recovery of their wages, by complaint to a justice of the peace, under the 5 & 6 Will. 4, c. 19, s. 15. *The Agnes*, 1 Stuart, 58.

2. No suit or proceeding for the recovery of wages under the sum of fifty pounds shall be instituted by or on behalf of any seaman or apprentice in any Court of Admiralty or Vice-Admiralty, or in the Court of Session of Scotland, or in any Superior Court of Record in Her Majesty's dominions, unless the owner of the ship is adjudged bankrupt or declared insolvent, or unless the ship is under arrest or is sold by the authority of such Court as aforesaid, or unless any justices acting under the authority of this Act refer the case to be adjudged by such Court, or unless neither the owner nor master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore (17 & 18 Vict. c. 104, s. 189). 1 Stuart, 358.

This is now changed by the Imp. Act of 1861.

3. Summary tribunal for the trial of seamen's suits for the recovery of their wages, for any amount not exceeding fifty pounds, before any two justices of the peace acting in or near to the place at which the service has terminated. *ibid*, s. 188.

4. It is a good defence to a suit for wages by a seaman, that he could neither steer, furl, nor reef. *The Venus*, 1 Stuart, 92.

5. Discharge and wages demanded on the ground that the vessel was not properly supplied with provisions on the voyage to Quebec, whereby seamen's health had been impaired, and they were unable to return. The circumstances of the case examined, and the master dismissed from the suit, the seamen returning to their duty. *The Recovery*, 1 Stuart, 128.

6. Imprisonment of a seaman by a stranger for assault does not entitle him to recover wages during the voyage and before its termination. *The General Hewitt*, 1 Stuart, 186.

(*Wages.*)

7. The detention of a vessel during the winter by stranding in the river St. Lawrence, on her voyage to Quebec, where she arrived in the succeeding spring, does not defeat the claim of the seamen to wages during the winter. *The Factor*, 1 Stuart, 183.

8. Seaman going into hospital for a small hurt not received in the performance of his duty, not entitled to wages after leaving the ship. *The Captain Ross*, 1 Stuart, 216.

9. In cases arising out of the abrupt termination of the navigation of the St. Lawrence by ice, and a succession of storms in the end of November, seamen shipped in England on a voyage to Quebec and back to a port of discharge in the United Kingdom, entitled to have provision made for their subsistence during the winter, or their transportation to an open sea-port on the Atlantic, with the payment of wages up to their arrival at such port.

The Jane, 1 Stuart, 256.

10. The master is not at liberty to discharge the crew in a foreign port without their consent; and if he do, the maritime law gives the seamen entire wages for the voyage, with the expenses of return. *ibid.*

11. Circumstances, as a semi-naufregium, will vest in him an authority to do so, upon proper conditions, as by providing and paying for their return passage, and their wages up to the time of their arrival at home. *ibid.*

12. It is for the Court to consider what would be most just and reasonable; as, whether the wages are to be continued till the arrival of the seamen in England, or to the nearest open commercial port, say Boston, or until the opening of the navigation of the St. Lawrence. *ibid.*

13. Under the peculiar circumstances of this case, wages decreed, including the expense of board and lodging, until the opening of the navigation of the St. Lawrence. *ibid.*

14. Three of the promoters shipped on a voyage from Milford to Quebec and back to London, the eight remaining promoters shipped at Quebec for the return voyage; and all had signed articles accordingly. The ship came in ballast to Quebec, and after taking a cargo sailed from Quebec on her return voyage, and was wrecked in the river St. Lawrence and abandoned by the master as a total loss. *Held*, 1. That the seamen who shipped at Milford were entitled to

(*Wages.*)

wages for services on the outward voyage from Milford to Quebec, and one-half the period that the vessel remained at Quebec, notwithstanding that the outward voyage was made in ballast; 2. That the seamen who shipped at Quebec, having abandoned, were not entitled to claim wages; 3. In cases of wreck, the claim of the seamen upon the parts saved is a claim for salvage, and the quantum regulated by amount which would have been due for wages.

The Isabella, 1 Stuart, 281.

15. But see "The Merchant Shipping Act, 1854" (17 & 18 Vict. c. 104, s. 183), which came into operation on the 1st of May, 1855, and by which wages are no longer to be dependent on the earning of freight. *ibid*, 1 Stuart, 288, note.

16. Under the 190th section of "The Merchant Shipping Act, 1854," no seaman engaged for a voyage or engagement to terminate in the United Kingdom, can sue in any Court abroad for wages, unless he is discharged with such sanction as is required by the Act. *The Haidee*, 2 Stuart, 25.

17. Vice-Admiralty Courts have no jurisdiction over a contract for wages different from the ordinary mariner's contract. *The City of Petersburg*, 2 Stuart, 343.

See *Jurisdiction*.

18. Promovent claimed a balance due for wages and disbursements, to which the defendants pleaded a set-off for money deposited by promovent with agents of the vessel, which was lost to the owners through the absconding of one of the agents and their failure. There was no charge against him of corrupt motive or improper dealing, but the owners sought to make him responsible for the default of the agents, who had theretofore been always employed for the ship. *Held*, That the deposit of the money while in port with the known agents of his employer was not only justifiable, but what the master in common prudence was bound to do, and that judgment should be for him, with costs. The cases as to forfeiture of wages and the liability of masters reviewed.

The Alexander Williams, Young, 217.

19. The master of a vessel brought action for an alleged balance due him for wages and disbursements. It appeared from the evidence, though it was not alleged in the pleadings, that he had an interest in the vessel as part owner. While in command, he had been guilty of gross immorality and intemperance, evidence of which

(Wages.)

was produced at the hearing on the part of the defendants; but the immediate cause of his dismissal was dissatisfaction as to his dealing with the vessel's earnings. The matter finally resolved itself into a mere question of account, and upon an adjustment of the accounts it was *Held*, That judgment should be for the defendants. *Semble*, That the plaintiff's dismissal could not have been justified on the ground merely of immorality or intemperance. *The Belle Mudge*, Young, 222.

See *ante*, p. 127.

20. The plaintiff claimed a sum for wages up to the term of his dismissal, and a further sum under a special contract which he alleged had been made upon his entering into the service of defendant, but of which he failed to produce any evidence. The defendant paid the first sum into Court, having first tendered it to plaintiff. *Held*, That there should be judgment for defendant, with costs. *Quære*: As to the jurisdiction of the Court to inquire into the special contract if the plaintiff had brought forward any evidence in support of it, the contract, if any, having been made in England. *The Peeress*, Young, 265.

21. The master of *The Aura*, who was also a part owner, instituted proceedings in the Court of Vice-Admiralty against the ship to recover a balance of wages due him. *Held*, That the Court could entertain his claim, and that the fact of his being a part owner did not affect his right to recover. The plaintiff had accepted a promissory note from three of his co-owners for the amount he now claimed, the note never having been paid. *Held*, That this did not take away his lien upon the ship, although sold to, and paid for, by a third party, in ignorance of the debt.

The Aura, Young, 54.

22. The master of a vessel having brought an action against the owners, claiming a large balance due him for disbursements and wages, they pleaded inaccuracy in the charges, fraud, and mismanagement of the vessel, but produced no evidence in support of their charges against him. The master's accounts being very complicated were referred by the Court to competent persons, with the concurrence of both parties to the suit, and the referees, after a thorough examination, reported in favor of the master to the extent of two-thirds of his claim. To this report the owners filed numerous objections, alleging fraud, etc., as before. *Held*, That in the absence

(*Wages.*)

of direct proof of collusion or fraud on the part of the master, the report must be confirmed. Exceptional rules in the adjustment of such accounts. *The James Fraser*, Young, 159.

23. Two out of three promovents shipped at Bermuda, on board the ship libelled, a blockade runner, for the round voyage from Bermuda to Wilmington, North Carolina, and thence to Halifax, Nova Scotia. The remaining promovent shipped at Wilmington in room of one of the others. No ship's articles were signed, but there was evidence to show that the master had contracted to pay to each of the promovents certain specified sums, in three equal instalments. The contract was absolute as to two of the instalments, and, as to the third, there was a condition that was to be paid only if the claimant's conduct were satisfactory. *Held*, 1. That this was not an ordinary engagement for seamen's wages, but a special contract. *The City of Petersburg*, Young, 1.

24. Action by master and three seamen for their wages. The accounts produced by the master, who had also acted as ship's husband, were extremely unsatisfactory and unreliable. He claimed a balance due him of \$317.80, but failed to establish his right to more than \$34.80. There was nothing against the demand of the other promovents, and the amounts claimed were awarded them. The sums so recovered, being all under \$40, and therefore might have been sued for before two justices of the peace or a stipendiary magistrate. *Held*, That the promovents should not have their costs. *The Ann*, Young, 104.

25. The master of a ship sought to enforce a claim *in rem* for wages as well as for disbursements and liabilities assessed in respect of necessities supplied the ship, for which he made a joint note with the owner for \$250, under an agreement that the note should be paid out of the earnings of the ship. This agreement was made without the consent or knowledge of the mortgagee. *Held*, That the master had a maritime lien for his wages as well as for disbursements actually and necessarily made and liability incurred in connection with the proper working and management of the ship, and that the limit of such liability would be to the value of the vessel and freight.

(2) That the master did not exceed his authority in borrowing money on the note for the purposes of the ship, it appearing that the sum so borrowed had been duly and properly expended for the ship. *The Queen of the Isles*, 3 E. C. R. 258.

(Wages.)

26. Disobedience will work a forfeiture of wages. *The Coldstream*, 1 Stuart, 386.

See *Justification*, 1, 2.

27. In the year 1887, A. sold a vessel to M. and S. under an agreement stipulating, among other things, that the vessel was to remain in the name and under the control of A. until the purchase money was fully paid, and that, in the event of the terms of the contract not being performed by the vendees, A. was entitled to take possession, and the vendees would thereupon lose all claim or title they might have to the ship or to moneys paid by them in respect of the contract. This agreement was not registered. For some time the vendees performed the terms of the agreement, but having failed to do so after a certain period, A. resumed possession of the vessel. Upon an action *in rem* for wages due to a seaman employed by the vendees, and which were earned during their possession of the vessel, *Held*, That the amount of the claim being below \$200, the Exchequer Court had no jurisdiction under sec. 34 of The Inland Waters Seamen's Act.

(2) That the property in the vessel had not passed to the vendees under the agreement, and that whatever rights the seaman had *in personam* must be enforced against the persons who employed him and not against the vendor.

(3) That the agreement was not a bill of sale within the meaning of The Merchant Shipping Act, 1854, s. 55.

(4) That if summary proceedings had been taken as provided by The Inland Waters Seamen's Act, a direction might have been made to provide for the realization of the seaman's claim against the vessel, and she might have been tied up by the Court on his showing that the vendees who employed him were then the supposed owners of the vessel, and when action was brought were insolvent within the meaning of section 34 of the said Act.

The Jessie Stewart, 3 E. C. R. 132.

28. The master of a vessel registered at the port of Winnipeg, and trading upon Lake Winnipeg had, in the years 1888, 1889 and 1890, no lien upon the vessel for wages earned by him as such master.

(2) Even if such a lien were held to exist, there was in the years mentioned no Court in the province of Manitoba in which it could have been enforced; and it could not now be enforced under The Colonial Courts of Admiralty Act, 1890 [53 & 54 Vict. (U. K.)

(*Wages.*)

c. 27], or The Admiralty Act, 1891 [54 & 55 Vict. (Can.), c. 29], because to give those statutes a retroactive effect in such a case as this would be an interference with the rights of the parties.

The Aurora, 3 E. C. R. 228.

29. The master of a ship has a lien for wages as against a mortgagee. *The C. N. Pratt*, 5 Can. L. T. 417; *The Maytham*, 18 Can. L. J. 285.

30. The ship *M.* arrived in Liverpool, England, with a cargo consigned to parties there, with instructions to the master by the owners for their agents to collect inward freight and transact the ship's business. The agents purchased an outward cargo of coals for St. John, N. B., and informed the master it was on ship's account. By request of the agents, the master signed a draft for payment of cargo, although the owners, but unknown to the master, had sent the agents funds for the coals. The agents shortly after became insolvent. *Held*, in an action by the master for his wages, that the owners could not charge the draft against the master, and that he was entitled to recover his full wages with costs.

The Mistletoe, Stockton, *ante*, 122.

31. The plaintiff brought an action against the P. for wages and disbursements as master of the vessel. In answer to the master's request when abroad for a statement of his account and for payment, the managing owner sent the master his individual promissory note for \$800, payable with interest, on account of the wages. The managing owner subsequently became insolvent. The master, on his return to St. John, N. B., demanded payment from the owners of his wages and disbursements, the sum claimed including the amount of the promissory note. The owners, by their counterclaim, sought to set-off against the master's claim, among other things, the amount of the promissory note; but *Held*, That the master, under the circumstances of the case, had not lost his lien upon the vessel. The set-off was rejected, and the plaintiff held entitled to recover, with costs. *The Plover*, Stockton, *ante*, 129.

32. Under the Seamen's Act (R. S. C. c. 74), a claim for less than \$200 for wages earned on board a Canadian registered vessel must be enforced by a summary proceeding under secs. 48-55 of the Act. A County Court judge has no jurisdiction to try such a claim in an ordinary action for wages. *Beattie v. Johansen*, 28 N. B. 26.

(*Wages.*)

33. The Merchant Shipping Act, 1854, excludes the Admiralty jurisdiction in suits for wages of master and mariners when the amount due is less than £50 sterling. The evidence in this case showing a less amount due, the claim of a master was dismissed without exception to the jurisdiction pleaded.

The Margaretha Stevenson, 2 Stuart, 192 (1873).

34. That by the Dominion statute, "The Seamen's Act, 1873," the jurisdiction of the Vice-Admiralty Court of Quebec, as respects vessels registered in the provinces of Quebec, Nova Scotia, New Brunswick and British Columbia, being restricted to claims for masters and seamen's wages for \$200, the 189th and 191st sections of the Merchant Shipping Act, 1854, are so far repealed as to reduce £50 stg. to \$200, but that the Vice-Admiralty Act, 1863, has not in any other way effected or repealed these sections.

The Royal, Cook, 326 (1883).

35. In a suit by the master of a steam-tug against the owner for wages and disbursements, *Held*, That a Vice-Admiralty Court cannot, under the Act of 1863, exercise its jurisdiction so as to give effect to an agreement between the owner and master of a vessel, where the duties to be performed are miscellaneous and not incident to the situation of a master. *ibid.*

36. In a suit for ship's disbursements brought by the master, who became liable for their payment upon condition that the owner did not pay them, there must be a demand on the owner by the creditors or by the master before the master can validly bring his suit; and when the master sues for ship's disbursements without first presenting his accounts he cannot have costs. *ibid.*

37. The 189th section of the Merchant Shipping Act, 1854, applies to foreign as well as to British vessels, and a Vice-Admiralty Court cannot entertain a suit for seamen's wages, the demand being below £50 sterling, except upon a reference as prescribed by that Act. *The Monark*, Cook, 345 (1883).

38. But held by the Maritime Court of Ontario that the Merchant Shipping Act, 1854, is not to be read in connection with the Vice-Admiralty Act, 1863, which gives jurisdiction to that Court, and that the Court had jurisdiction although the sum claimed was under \$200. *The Robb*, 17 Can. L. J. 65 (1881).

(Wages.)

39. The master of a vessel registered in Canada, being also part owner, was discharged at the home port, where the other owners also resided. He caused the vessel to be arrested in a cause of subtraction of wages for an amount under \$200. *Held*, That the Court had no jurisdiction under 36 Vict. c. 129, s. 56 (Can.), and the cause was dismissed with costs.

The Jonathan Weir, Stockton, *ante*, 79 (1883).

This is not now the law.

40. The master of a steam barge allowed to sue for wages under £50, and also held, damages for wrongful dismissal may be sued for and recovered as wages. *The W. B. Hall*, 8 Can. L. T. 169.

41. A seaman, the engineer of a tug, took proceedings in the Exchequer Court, Admiralty side, on a claim for \$136 wages, and arrested the ship. On the trial it was contended that the Court had no jurisdiction to try a claim for less than \$200, the owner not being insolvent, the ship not being under arrest, and the case not referred to the Court by a judge, magistrate, or justice, pursuant to R. S. C. c. 74, s. 34 (The Inland Waters Seamen's Act). *Held*, That the Admiralty Act, 1891, conferred upon the Exchequer Court all the jurisdiction possessed by the High Court, Admiralty Division, in England, as it stood on the 24th July, 1890, the date of the passing of the Colonial Courts of Admiralty Act, 1890, and that the Admiralty Court in Canada could now try any claim for seamen's wages, including claims below \$200; and that s. 34 of R. S. C. c. 75, was repealed by implication (not having been expressly reserved) to the extent, at any rate, that it curtailed the jurisdiction of the Admiralty Court to entertain claims for seamen's wages below \$200 in amount. *The W. J. Aikens*, 4 E. C. R. 7 (1893).

The last named case was decided after the note to *The Jonathan Weir*, *ante*, p. 80, was printed. It is satisfactory to observe the decision supports the view of the law expressed in that note.

42. Where a statute required the execution of a warrant or process under an order of two justices of the peace for seamen's wages to be authorized by the judge of the Vice-Admiralty Court. *Held*, That the enactment imposed upon the Court a duty to supervise the proceedings of the magistrates. *The Canadienne*, Cook, 209.

43. It appearing that a warrant and process of two magistrates, issued for the sale of an undivided interest in a vessel, had not legally issued a petition to authorize them was refused. *ibid.*

WAR.

1. It does not exist till authorized by His Majesty.
The Dart, Stewart, 301.
2. Property found in the country at the commencement of a war is not liable to be seized. *ibid.*
See *Foreign Enlistment Act*; *Forfeitures*; *Jurisdiction*; *Vice-Admiralty Courts*.

WARRANT.

- See *Practice*.
See Rule 35, *ante*, p. 420.

WATCH.

1. A passenger cannot be compelled to keep watch unless in cases of necessity. *The Friends*, 1 Stuart, 118.

WITNESS.

1. As to the competency of the master as a witness in suits with seamen. *The Sophia*, 1 Stuart, 96.
2. Master admitted as a witness in a case of pilotage. *ibid.*
3. While the master exercises the control of the navigation of the ship, and before delegating his authority to the pilot, as the liability is with him, he is an incompetent witness in collision cases. *The Lord John Russell*, *ibid*, 194.
4. While the pilot has the control of the navigation of the ship, as he is substituted in the place of the master—and the master has ceased, therefore, to be liable as such—the liability for default, negligence, or unskilfulness, comes to rest upon the pilot, and he is not a competent witness. *ibid.*
5. The question resolves itself into a question of negligence, or want of skill and care in those persons who, at the precise time, had the control and direction of the vessels.
The Mary Campbell, 1 Stuart, 224.
6. Defendants bail is an incompetent witness.
The Sophia, *ibid*, 219.
7. The law of evidence, since the above decisions, as respects interested witnesses, has been changed; and now, by Lord Denman's Act, 6 & 7 Vict. c. 85, and Lord Brougham's Act, 14 & 15 Vict. c. 99, the evidence of interested parties is made admissible, leaving

(Witness.)

the question of credibility to the discretion of the tribunal before which the evidence is given. See *The Courier*, 2 Stuart, 91.

8. Money payments to witnesses larger than those legally due them, even when shown to have been made with no wrong intent, but from an unfounded apprehension that they would leave the country before testifying, will so discredit their testimony as seriously to affect its credibility. *The N. Churchill*, Cook, 65.

WORDS.

See *Acts of Parliament*, 2; *Admiralty*, 1; *Discretion*; *Fishery Acts of Canada*, 5, 8; *Interpretation of Terms*; *Mariner's Contract*; *Reasonable and Probable Cause*; *Seamen*, 21, 22, 23; *Voyage*, 1.

WRECK.

1. Salvage allowed to the chief and second mates, and carpenter, for their meritorious services, equal to one-third of the gross proceeds arising from the sale of the articles saved from the wreck.

The Flora, 1 Stuart, 255, note.

2. Compensation decreed to seamen out of the proceeds of the materials saved from the wreck by their exertions.

The Sillery, *ibid*, 182.

3. In the case of a wrecked and derelict steam-tug, one-third of the gross proceeds arising from its sale allowed, over and above costs, to salvors for meritorious services. *The Progress*, Cook, 308.

For citation of Canadian and United States laws relating to reciprocal wrecking privileges, see note to *The Frier*, *ante*, p. 184.

YOUNG (THE HON. SIR WILLIAM).

See *Nova Scotia*.

INDEX.

NOTE.—The Index does not refer to the Digest, nor to the Rules of 1893. For the Rules a separate Table of Contents will be found, *ante*, p. 534.

ACCIDENT.

See INEVITABLE ACCIDENT.

ACCOUNTS.—The Court has now jurisdiction to settle accounts between co-owners.

ACT OF PARLIAMENT.

See STATUTES.

ADMIRALTY JURISDICTION.—Since the passing of the statute 26 & 27 Vict. c. 24, s. 10 (The Vice-Admiralty Courts Act, 1863), the Court has jurisdiction to entertain a claim for damage to a railway car standing on a wharf within the limits of a county, by the hawser of the vessel coming in contact with the car and overturning it. *The Teddington*, 45.

2. A foreign steamship, the E., while in the harbor of St. John, N. B., loading a cargo of deals, bought and received on board a quantity of coals for the use of the ship. The coals were purchased to be delivered in the bunkers of the steamer, and the coal merchant employed a third party to put the coals on board. The steam power to hoist the coals on board was furnished by the E. The plaintiff was employed by the third party to put the coals on board, and while so employed was injured by the breaking of the hoisting rope. *Held*, That an action could not be maintained against the steamer; that the Court had no jurisdiction; and that the Vice-Admiralty Courts Act, 1863, sec. 10, sub-sec. 6, did not confer authority to entertain such an action. *The Enrique*, 157.

(In view of recent decisions it is submitted this case must be considered overruled. *See* note to this case, 161, *et seq.*)

3. In so far as regards Canadian registered vessels, the Court can entertain claims for masters' and seamen's wages if the amount due is or exceeds two hundred dol-

ADMIRALTY JURISDICTION.—Continued.

lars, and this under the Dominion statute, the Seamen's Act, 1873. *ibid.* *See contra.* *The Jonathun Weir*, 79. *See* note *ibid*, p. 80, *contra*.

4. For the statement of the law upholding the jurisdiction of the Court in causes of damages to a stationary object, a bridge for instance, *see The Maggie M.* and note. *ante*, p. 185.

AMENDMENT.—*See* note to *The Moud Pye*, p. 103.

APPEAL.—An appeal from a decree or order of a Vice-Admiralty Court lies to Her Majesty in Council; but no appeal shall be allowed, save by permission of the judge, from any decree or order not having the force or effect of a definitive sentence or final order (26 Vict. c. 24, s. 22); appeal to be made within six months. *See The Teddington*, 65 n.

(*See* now, however, "The Admiralty Act, 1891," 402).

APPRAISEMENT.—A commission of sale may issue in the first instance. *The Nordcap*, p. 173.

2. *See* Rules 145 to 154 of 1893 for present practice as to appraisement and sale.

BOTTOMRY BOND.—A vessel owned and registered in New Brunswick was sent with a cargo of deals from that province to Queenstown, Ireland, the intention being to sell her to best advantage, after arrival and discharge of cargo. Efforts to sell the vessel were not successful, and after remaining some time at Queenstown, the agent, by directions of the owner, instructed the captain to return with the vessel in ballast to New Brunswick. Unable to get needed funds from the owner or agent to make

BOTTOMRY BOND.—Continued.

necessary disbursements for return voyage, the captain, after due notice, borrowed from plaintiff the required amount on bottomry and brought the vessel back to New Brunswick. After her arrival, the bondholder, not being able to obtain payment, began suit for recovery of the amount. The owner and mortgagees of the vessel objected to the validity of the bond, on the ground that, under the circumstances, the voyage was ended at Queenstown; that the vessel required no repairs for a new voyage; was in no distress, and that the captain had no right to give the bond. But *Held*, That as the vessel was sent for sale, and that not being effected, the return was but a continuation of the voyage across; that Queenstown was a foreign port; that as the captain was unable to get necessary funds in any other way, he was justified in borrowing on bottomry, and that the bond must be upheld. *The Elysia A.*, 28.

See note to this case, p. 42, for citation of authorities.

CASES.—For decisions under Sailing Rules see p. 385.

COLLISION.—The passenger steamer *S.*, sailing up the river St. John, met the steam-tug *N.* coming down, near Akerley's Point, where the river is about half a mile wide. The *S.* was near the western shore, which was on her port side going up; the *N.* about one hundred and fifty yards from the same side of the river. The *S.*, by keeping her course when she first sighted the *N.*, might have avoided the collision, but instead ported her helm, which gave her a diagonal course to starboard towards the east side, and as a result struck the *N.* on the starboard quarter, and sank her. *Held*, That the *S.* was to blame, and liable for the damages sustained; also held that when two vessels are meeting end on, or nearly so, the rule to port helm may be departed from, where there are reasonable grounds for believing such course is necessary for safety, and consequently the *N.* was not to blame,

COLLISION.—Continued.

immediately before the collision, for putting her helm to starboard. *The Soulanges; The Neptune*, 1.

2. Two vessels, the *R.* and the *G.*, were sailing up the river from St. John to Fredericton. At Perley's Reach, so called, near Fredericton, where the river runs about north-west and south-east, and is about three hundred yards wide, the *R.* being on the starboard side of the river, and on her starboard tack, the *G.* on the port side of the river, and on her port tack, the vessels were passing each other port side to port side. When the *G.* was nearly abreast the *R.* she suddenly rounded to, and struck the *R.* on the port side forward of the main chains, when the *R.* immediately sank. *Held*, That it was not a case of inevitable accident; that the *R.*, being on the starboard tack, had the right of way; that the *G.* was to blame for the collision, and was liable for damages. *The Grace*, 10.

3. For Imperial and Canadian legislation as to collision see note to *The Grace*, p. 24.

4. A railway passenger car, standing upon a track on a wharf on the western side of the harbor of St. John, and within the limits of the city of St. John, was injured by a hawser attached and belonging to a steamship moored to the wharf. *Held*, That the passing of the statute 26 & 27 Vict. c. 24, s. 10, the Vice-Admiralty Court has jurisdiction to entertain a claim for damage to property done by any ship, although the property injured is within the limits of a county, and situate upon the land. *The Teddington*, 45.

See also judgment of Palmer, J., in this case on application for prohibition. *ibid*, 54.

5. The *A.* and the *B.* came into collision on the high seas. The *B.* was close-hauled on her starboard tack, the *A.* on her port tack, running free. It was not shown that the lights of the *B.* were so placed as to be fairly visible to the *A.* Both vessels kept their courses, and the collision took place. *Held*, notwithstanding the lights of the *B.* were not fairly visible to the *A.*, it was the

COLLISION.—*Continued.*

duty of the latter to keep clear and give way, and not doing so, she was liable for the damagea. *The Arklow*, 66.

6. The last case was reversed on appeal to the Judicial Committee (9 App. Cas. 136), the Court holding where there has been a departure from an important rule of navigation, if the absence of due observance of the rule can by any possibility have contributed to the accident, then the party in default cannot be excused.

Where the lights of the complaining vessel were not properly burning, and were not visible on board the other vessel. *Held*, That in the absence of proof that this latter was also to blame, the suit must be dismissed. *The Arklow*, 72; s. c. 9 App. Cas. 136.

7. The tug G. was proceeding up the river St. John, and the tug V. coming down; when near Swift Point they came into collision, and the V. sank. The G., at the time of the accident, was, contrary to the rules of navigation, near the westerly shore on the port side of the vessel; the V. did not exhibit any masthead white light, as required by the regulations. *Held*, That both vessels were to blame; that the collision was occasioned partly by the omission of the V. to exhibit her masthead white light, but principally by the course of the G., and a moiety of the damages was given to the V. with costs. *The General*, 86.

8. The vessel M. G., under command of a pilot, was entering the Miramichi, and near the Horse Shoe Bar, in the lower part of Bay du Vin, came into collision with a lightship there placed for the safety of navigation. *Held*, That under the evidence no fault was attributable to the M. G.; that it was a case of inevitable accident, and the suit was dismissed, but without costs, as the Crown was the promovent, and no costs can be given against the Crown. *The Minnie Gordon*, 95.

9. The M., close-hauled on the port tack, heading about south-west by west, and going about three knots an hour, with the wind

COLLISION.—*Continued.*

south, came into collision with the M. P., heading east, and running free about ten knots an hour, and was totally lost. *Held*, from the evidence, that the M. P. had no proper lookout; that failure to have a proper lookout contributed to the collision, and she was accordingly condemned in damages and costs. *The Maud Pye*, 101.

10. The V., stone laden, on a voyage from Dorchester to New York, off Tynemouth Creek, in the Bay of Fundy, close-hauled on the starboard tack, came into collision with the E. K. S., running free, in ballast, going up the Bay to Moncton. The night was dark and foggy, and from the evidence it appears that the V. had no mechanical fog-horn, as required by the regulations, and that the one she had was not heard on board the E. K. S., which was to windward. *Held*, That it was a case of inevitable accident; that the E. K. S. was not to blame, and the action was dismissed without costs to either party. It is a rule of the Admiralty that where there is a material variance between the allegations of the libel and the evidence, the party so alleging is not entitled to recover, although not in fault, and fault is established against the other vessel. *The Emma K. Smalley*, 106.

11. A tug-boat was engaged by the charterers of a vessel, the E., to tow her from the harbor of St. John, N. B., through the Falls at the mouth of the river, beneath a suspension bridge which spans the Falls at the point where the river flows into the harbor. The vessel towed was chartered to carry a cargo of ice from the loading place above the Falls to New York, and the charterers were to employ the tug and pay for the towage services. The tug, having waited to take another vessel in tow, together with the E., was too late in the tide, and in going under the bridge the topmast of the E. came into collision with the bridge and was damaged. *Held*, That the Court had jurisdiction to entertain the suit; that the delay of the tug in going through the Falls was evidence of negligence; and the tug and owners

COLLISION.—*Continued.*

were condemned in damages and costs. *The Maggie M.*, 185.

12. Two vessels—the M. P. and the P.—came into collision in the Bay of Fundy, whereby the former was badly damaged. The wind at the time was blowing strong from south south-east. The M. P. was hove to on the port tack, under a reefed mainsail; and the P. was close-hauled on the starboard tack. The weather at the time was foggy. The M. P. did not have a regulation fog-horn on board, but had a tin one blown by the mouth. When the P. was first seen by the M. P. she was from a quarter to a half mile distant. The M. P. was loaded with piling, bound for New York. The P. did not change her course, and ran into the M. P. and caused the injury. *Held*, That although the M. P. was on her port tack, she was practically hove to, and could execute no manœuvre to avoid the collision; that the absence of a regulation fog-horn on board did not occasion or contribute to the collision; but that the collision was occasioned by the want of a proper lookout on board the P., and she was therefore condemned in damages and costs. *The Paramatta*, 192.

CONVENTION OF 1818.—See *The White Fawn*, 200.

COSTS.—When both parties in fault, and damages are divided, each party must bear his own costs. See *contra The General*, 86.

2. Costs are not given against the Crown. *The Minnie Gordon*, 95.

3. For cases as to security for costs, see p. 128.

See SECURITY FOR COSTS.

DAMAGES—Division of. *The General*, note, 91.

2. — Measure of. The owner is entitled to have his loss made good. See note to *The Maud Pye*, 104.

3. — to Property. See *Collision*, 4, 11; *The Teddington*, 45; *The Maggie M.*, 185.

4. — to Person. See *The Enrique*, 157, and note to that case.

EVIDENCE.—It must support the allegations in the pleadings. *The Emma K. Smalley*, 106, and note to case.

FEES.—Are now regulated by Rules of 1893, 527.

FISHERY ACTS.—As to the meaning of the words “preparing to fish.” *The White Fawn*, 200.

FOG HORN.—See *The Paramatta*, note, p. 199; *Collision*, 10, 12.

HABEAS CORPUS.—*The Chesapeake*, 208.

INEVITABLE ACCIDENT.—See *The Emma K. Smalley*, 106; *The Minnie Gordon*, 95, and note to last case.

INLAND NAVIGATION.—See R. S. C. c. 74, p. 361; R. S. C. c. 79, p. 372.

INTEMPERANCE.—As it affects right to wages, 127.

INTERPRETATION OF TERMS.—See pp. 395, 413.

JUDGE.—Appointment now governed by Admiralty Act, 1891, 402.

JUDICIAL COMMITTEE—Law as to Appeals to. 65.

JURISDICTION.

See ADMIRALTY JURISDICTION.

LIEN.

See MARITIME LIEN.

LIGHTS.—Where the lights of the complaining vessel were not properly burning, and were not visible on board the other vessel, *Held*, That in the absence of proof that this latter was also to blame, the suit must be dismissed. *The Arklow*, 72.

2. An omission to exhibit a masthead white light will render a tug liable to a moiety of the damages, although the collision was mainly caused by the other tug being on the wrong side of the channel of a river. *The General*; *ante*, 86.

For existing regulations respecting the navigation of Canadian waters, see *ante*, p. 372. (R. S. C. c. 79.)

LOOKOUT.—See *The Maud Pye*, 101, 104; *The Emma K. Smalley*, 106.

Digest, *Collision*, 118, 126, 134, 138, 156, 161, 162, 163.

MARITIME LIEN.—The plaintiff brought an action against the P. for wages and disbursements as master of the vessel. In answer to the master's request when abroad for a statement of his account and for payment, the managing owner sent the master his individual promissory note for \$800, payable with interest, on account of the wages. The managing owner subsequently became insolvent. The master, on his return to St. John, N. B., demanded payment from the owners of his wages and disbursements, the sum claimed including the amount of the promissory note. The owners, by their counter-claim, sought to set-off against the master's claim, among other things, the amount of the promissory note; but *Held*, That the master, under the circumstances of the case, had not lost his lien upon the vessel. The set-off was rejected, and the plaintiff held entitled to recover, with costs. *The Plover*, 129.

See note to this case, *ante*, 134, where the English, American and Canadian cases are cited.

2. The House of Lords, in *The Sara*, 14 App. Cas. 209, decided that a master had no lien for his wages and disbursements, but it was subsequently given by the Merchant Shipping Act, 1889 (Imp.), *ante*, p. 85. The same law now obtains by legislation in Canada as respects the inland waters. p. 370.

3. As to priorities of liens, see note to *The Borzone*, p. 118.

MARSHAL—Appointment of. See Admiralty Act, 1891, 402.

MISDEMEANOR.

See *INTEMPERANCE*.

MORTGAGE.—Vice-Admiralty Courts have jurisdiction in respect of any mortgage when the ship has been sold by a decree of the Court, and the proceeds are under its control. 3 & 4 Vict. c. 65, s. 3, p. 315; 24 Vict. c. 10, s. 11, p. 350.

MUTUAL FAULT.

See *DAMAGES*—DIVISION OF.

MOORING.—*The Frier*, 180.

NAVIGATION.—The same rules of navigation, and the same precautions for avoiding collisions and other accidents as are now adopted in the United Kingdom and other countries, are also adopted in the Dominion of Canada. R. S. C. c. 79, p. 372.

See *INLAND NAVIGATION*.

NECESSARIES.—As to priority of payment. *The Borzone*, 116, and note.

2. For present jurisdiction as to necessities, see 3 & 4 Vict. c. 65, s. 6, p. 316; and 54 & 55 Vict. c. 27, s. 2, sub-sec. 2, p. 387.

ORDERS IN COUNCIL.—Approving Rules of 1893, 409, 410.

PILOTAGE.—Vice-Admiralty Courts have jurisdiction in respect of pilotage (26 Vict. c. 24, s. 10). This Act is now repealed by Colonial Courts of Admiralty Act, 1890; but the Court has the same jurisdiction over pilotage as the High Court of Admiralty. Under the Merchant Shipping Act, 1854, s. 2, "seaman" includes pilot.

PIRACY.—See *The Chesapeake*, 208.

PLEADINGS.—It is a rule of the Admiralty that where there is a material variance between the allegations of the libel and the evidence, the party so alleging is not entitled to recover, although not in fault, and fault is established against the other vessel. *The Emma K. Smalley*, 106.

See note to this case, p. 114; also *ante*, p. 154.

2. Under R. 61, every action now shall be heard without pleadings unless the judge shall otherwise order. p. 425.

POSSESSION.—Power given to any Court, having Admiralty jurisdiction in any of Her Majesty's dominions, to remove the master of any ship, being within the jurisdiction of such Court, and to appoint a new master in his stead.

See 17 & 18 Vict. c. 104, s. 240.

2. By 26 Vict. c. 24, s. 10, the jurisdiction of the Vice-Admiralty Courts was extended to claims between owners of any ship registered in the possession in which the Court is established touching the ownership, pos-

POSSESSION.—Continued.

session, employment or earnings of such ship. This Act is now repealed, and the jurisdiction is under 24 Vict. c. 24, s. 8. p. 349.

See Pritchard's Digest for Lord Stowell's judgments as to the nature of this jurisdiction prior to the latter Act.

PRACTICE.—Now governed by Rules of 1893, p. 413.

PRIORITY OF LIENS.—*The Borzone*, 118.

PRIVY COUNCIL.—Judgment of, reversing decision of Vice-Admiralty Court. *The Arklow*, 72.

See JUDICIAL COMMITTEE.

PROOF.—Evidence must support pleadings. *The Emma K. Smalley*, 106.

RAFTS.—As to navigating and anchoring in navigable river in Canada (31 Vict. c. 58, s. 2), now R. S. C. c. 79, art. 27, 380.

RESTRAINT OF TRADE.—See *The Huttie E. King*, 177.

RIVERS.—As to navigation of. 372.

RULES OF THE SEA.—For English rules, see 9 P. D., 248.

2 For rules relating to navigation of Canadian waters. R. S. C. c. 79, 372.

SALVAGE.—The *St. C.* having sailed from St. John, N. B., with a cargo of deals, bound for Liverpool, went ashore at Dipper Harbor, about twenty-five or thirty miles below St. John. The ship's agents at the latter place engaged two tugs, the *S. K.* and the *L.*, to go down and pull her off. For this service they were to receive an agreed sum, and the *S. K.* was to receive a further sum, in case the vessel was got off, for towing her back to St. John. When the tugs reached the vessel it was found that more men and appliances were needed, and the *S. K.* returned to St. John for a steam pump and other appliances. The *L.*, at the request of the master of the vessel, remained to tend on the ship. During the absence of the *S. K.* the vessel was floated, and through the exertions of the *L.* the ship was prevented from going on the rocks. *Held*,

SALVAGE.—Continued.

That the services rendered were more than towage services, and that the *L.* was entitled to salvage reward. *The St. Cloud*, 140.

2 A salvage service having been rendered a foreign vessel, which had gone ashore near Point Escuminac, near Miramichi Bay, in an action for the recovery of the amount of such service. *Held*, That the costs should be paid first out of the fund in Court, then the amount awarded as salvage services, and any balance to the owners, as the seamen had been paid. *The Nordcap*, 172.

3. Two vessels—the *F.* and the *A.*—were moored to a buoy on the north of the harbor of St. John, N. B. They were fastened together, and during the night broke loose by reason of the buoy becoming detached from its mooring, and they drifted bow foremost down the harbor. All on board the vessels were asleep. The plaintiffs' tug gave the alarm to those on board the vessels, and, by fastening on to the *A.*, towed both vessels out into the harbor and left them in a place of safety. *Held*, That the services rendered under the circumstances were salvage services, and although the tug had not, in fact, fastened a line to the *F.*, yet salvage services had been rendered her, for which she was liable, and that the owners of the tug could proceed separately against the *F.* without joining the *A.* in the action. *The Frier*, 180.

4. For citation of cases, see note, 145.

SALVORS.—See *The St. Cloud*, and note, 140.

SECURITY FOR COSTS.—A collision took place in New York Bay between *The Mary and Currie*, an American registered vessel, and *The Oakfield*, a steamship registered at the port of Glasgow, Great Britain. The plaintiff, a resident of the city of New York, United States, and owner of the American vessel, caused *The Oakfield* to be arrested in a cause of damage by collision at St. John, N. B., by process issued out of the registry of the New Brunswick Admiralty District. The defendants applied for secu-

SECURITY FOR COSTS.—*Continued.*

riety for costs, on the ground that the plaintiff was a non-resident. The plaintiff by affidavit declared his intention to remain within the jurisdiction until his suit was finally heard and determined, and resisted the application, relying on *Redondo v. Chaytor*, 4 Q. B. D. 453. Counsel for defendants contended that Order 65, rule 6, of the English Judicature Act, 1883, applied, and that under the Canadian Admiralty rules of 1893, Order 65 of the English High Court must govern. The case of *Michiels v. The Empire Palace, Ltd.*, 86 L. T. 132; 8 Times, L. R. 378, was pressed. Held, by Tuck, J., that there must be a stay of proceedings until security to the amount of \$300 was given. The learned judge, in the course of his judgment, stated that under the authority of *Redondo v. Chaytor* he would have refused the application, notwithstanding Order 65, had it not been for the decision of *Michiels v. The Empire Palace, Ltd. The Oakfield*, August 31, 1894 (not yet reported), 668.

Rule 134 of 1893 would appear to govern in a case of this kind.

See Costs.

SHIPWRECKS.—As to reciprocal rights of Canadian and United States vessels. 184.

STATUTES.—*Imp.*

- 27 Edw. 3, c. 13 : 147.
- 13 Rich. 2, c. 5 : 48, 62.
- 15 Rich. 2, c. 3 : 63.
- 2 Hen. 4, c. 11 : 63.
- 28 Hen. 8, c. 15 : 261.
- 21 Jas. 1, c. 16, s. 6 : 82.
- 11 & 12 Wm. 3, c. 7 : 261.
- 12 Anne, c. 18 : 148.
- 4 Geo. 1, c. 12 : 148.
- 5 Geo. 2, c. 7 : 333.
- 26 Geo. 2, c. 19 : 148.
- 14 Geo. 3, c. 83 : 323.
- 14 Geo. 3, c. 79 : 336.
- 14 Geo. 3, c. 88 : 323.
- 18 Geo. 3, c. 12 : 323.
- 31 Geo. 3, c. 31 : 323.
- 37 Geo. 3, c. 119 : 336.
- 43 Geo. 3, c. 138 : 323.

STATUTES.—*Continued.*

- 45 Geo. 3, c. 121 : 300.
- 56 Geo. 3, c. 82 : 399.
- 57 Geo. 3, c. 87 : 300.
- 59 Geo. 3, c. 38 : 200.
- 6 Geo. 4, c. 16 : 300.
- 7 Geo. 4, c. 38 : 261.
- 2 & 3 Wm. 4, c. 51 : 399.
- 3 & 4 Wm. 4, c. 41 : 65, 399.
- 5 & 6 Wm. 4, c. 62 : 336.
- 6 Wm. 4, c. 36 : 253.
- 1 Vict. c. 90 : 331.
- 1 & 2 Vict. c. 9 : 323.
- 2 & 3 Vict. c. 53 : 323.
- 3 & 4 Vict. c. 35 : 324.
- 3 & 4 Vict. c. 65 : 48, 51, 103, 134, 160, 162, 189, 314.
- 3 & 4 Vict. c. 78 : 324.
- 6 & 7 Vict. c. 22 : 337.
- 6 & 7 Vict. c. 34 : 342.
- 6 & 7 Vict. c. 75 : 296.
- 6 & 7 Vict. c. 38 : 399.
- 6 & 7 Vict. c. 76 : 210, 252, 258, 283.
- 7 & 8 Vict. c. 66 : 328.
- 7 & 8 Vict. c. 112, s. 16 : 85, 339.
- 7 & 8 Vict. c. 69 : 400.
- 8 & 9 Vict. c. 120 : 296, 299.
- 9 & 10 Vict. c. 93 : 53, 167.
- 10 & 11 Vict. c. 71 : 324.
- 10 & 11 Vict. c. 83 : 328.
- 11 & 12 Vict. c. 56 : 324.
- 11 & 12 Vict. c. 83 : 328.
- 12 & 13 Vict. c. 29 : 331.
- 12 & 13 Vict. c. 96 : 288, 324.
- 13 & 14 Vict. c. 26 : 147.
- 15 & 16 Vict. c. 21 : 324.
- 16 & 17 Vict. c. 48 : 331.
- 17 & 18 Vict. c. 104 : 24, 52, 79, 83, 127, 134, 151, 339.
- 17 & 18 Vict. c. 120 : 339.
- 17 & 18 Vict. c. 118 : 324.
- 18 & 19 Vict. c. 3 : 338.
- 18 & 19 Vict. c. 90 : 100.
- 18 & 19 Vict. c. 91 : 327, 339.
- 20 & 21 Vict. c. 39 : 329.
- 20 & 21 Vict. c. 147 : 152.
- 21 & 22 Vict. c. 99 : 331.
- 22 & 23 Vict. c. 10 : 324.
- 23 & 24 Vict. c. 88 : 327.

STATUTES.—Continued.

- 24 Vict. c. 10 (1861) : 48, 51, 79, 93, 158, 161, 348.
 24 & 25 Vict. c. 10 : 327.
 25 & 26 Vict. c. 20 : 338.
 25 & 26 Vict. c. 63 : 25, 68, 93, 152, 190, 199, 341.
 26 & 27 Vict. c. 24 (1863) : 45, 65, 79, 83, 157, 356, 401.
 27 & 28 Vict. c. 25 : 147.
 27 & 28 Vict. c. 95 : 53.
 28 & 29 Vict. c. 14 : 341.
 28 & 29 Vict. c. 63 : 332.
 28 & 29 Vict. c. 64 : 338.
 30 & 31 Vict. c. 3 : 331.
 30 & 31 Vict. c. 16 : 338.
 30 & 31 Vict. c. 45 : 401.
 30 & 31 Vict. c. 114, s. 31 : 38.
 30 & 31 Vict. c. 124 : 198.
 31 & 32 Vict. c. 71 : 81.
 36 Vict. c. 129, s. 56 : 79.
 36 & 37 Vict. c. 59 : 401.
 36 & 37 Vict. c. 66 : 27, 99.
 36 & 37 Vict. c. 85 : 25, 78, 87, 114, 199.
 36 & 37 Vict. c. 88 : 401.
 38 & 39 Vict. c. 77 : 82.
 39 & 39 Vict. c. 51 : 401.
 52 & 53 Vict. c. 46 : 134.
 53 & 54 Vict. c. 27 : 65, 84, 386.

Canadian.

- 31 Vict. c. 58 (R. S. C. c. 79) : 22, 25.
 31 Vict. c. 61 : 200, 206.
 33 Vict. c. 15 : 206.
 36 Vict. c. 55, s. 24 (R. S. C. c. 81, s. 43) : 156.
 36 Vict. c. 129, s. 56 (R. S. C. c. 74, s. 56) : 79, 131.
 37 Vict. c. 27 : 84.
 40 Vict. c. 2 (R. S. C. 137) : 166.
 43 Vict. c. 29, s. 6 (R. S. C. c. 79) : 26, 86, 110, 135, 199.
 R. S. C. c. 74 (Seamen's Act) : 361.
 R. S. C. c. 79 (Navigation Act) : 372.
 53 & 54 Vict. c. 27 (Colonial Courts Act) : 387.
 54 & 55 Vict. c. 29 (Admiralty Act) : 44, 65, 84, 207, 402.
 55 & 56 Vict. c. 4 : 184.

STATUTES.—Continued.

Ontario.

- R. S. Ont. c. 128 : 166.

New Brunswick.

- 19 Vict. c. 42 : 251, 253, 274.

United States.

- Act of Congress (Extradition) : 236.
 Act of Congress, 1890 (Wrecks, etc.) : 184.
 For list of statutes relating to Admiralty, see p. 306.

STEAMER.—The passenger steamer S., sailing up the river St. John, met the steam-tug N. coming down, near Akerley's Point, where the river is about half a mile wide. The S. was near the western shore, which was on her port side going up; the N. about one hundred and fifty yards from the same side of the river. The S., by keeping her course when she first sighted the N., might have avoided the collision, but instead ported her helm, which gave her a diagonal course to starboard towards the east side, and as a result struck the N. on the starboard quarter and sank her. *Held*, That the S. was to blame, and liable for the damages sustained; also held that when two vessels are meeting end on, or nearly so, the rule to port helm may be departed from, where there are reasonable grounds for believing such course is necessary for safety, and consequently the N. was not to blame, immediately before the collision, for putting her helm to starboard. *The Soulanges*; *The Neptune*, 1.

2. The tug G. was proceeding up the river St. John, and the tug V. coming down; when near Swift Point they came into collision, and the V. sank. The G., at the time of the accident, was, contrary to the rules of navigation, near the westerly shore on the port side of the vessel; the V. did not exhibit any masthead white light, as required by the regulations. *Held*, That both vessels were to blame; that the collision was occasioned partly by the omission of the V. to exhibit her masthead white light, but principally by the course of the G., and a moiety of the damages was given to the V. with costs. *The General*, 86.

STEERING AND SAILING RULES. 372

TABLE OF FEES.—By 26 Vict. c. 24, authority was given to Her Majesty in Council from time to time to establish tables of fees. See p. 358.

2. For present law relating to the establishment from time to time of tables of fees, see Colonial Courts of Admiralty Act, 1890, s. 7, p. 391.

3. For table of fees now in force, see p. 527.

TITLE.—The Act 26 Vict. c. 24, s. 10, gave Vice-Admiralty Courts jurisdiction touching the title and ownership of any vessel registered in the possession in which the Court is established. Prior to that Act they had no more than the ordinary jurisdiction possessed by the High Court of Admiralty before the passing of 3 & 4 Vict. c. 65 (1840). See the judgment in *The Australia*, 13 Moo. P. C. 132 (1859), on appeal from Vice-Admiralty Court of Hong Kong. The jurisdiction is now governed by 24 Vict. c. 10, s. 8. p. 349.

TORTS.—*The Enrique*, 157, and note.

TOWAGE.—Two vessels (the F. and the A.) were moored to a buoy on the north of the harbor of St. John, N. B. They were fastened together, and during the night broke loose by reason of the buoy becoming detached from its mooring, and they drifted bow foremost down the harbor. All on board the vessels were asleep. The plaintiffs' tug gave the alarm to those on board the vessels, and, by fastening on to the A., towed both vessels out into the harbor and left them in a place of safety. *Held*, That the services rendered under the circumstances were salvage services, and although the tug had not, in fact, fastened a line to the F., yet salvage services had been rendered her, for which she was liable, and that the owners of the tug could proceed separately against the F. without joining the A. in the action. *The Frier*, p. 180.

2. A tug-boat was engaged by the charterers of a vessel, the E., to tow her from the harbor of St. John, N. B., through the Falls, at the mouth of the river, beneath a

TOWAGE.—*Continued.*

suspension bridge which spans the Falls at a point where the river flows into the harbor. The vessel towed was chartered to carry a cargo of ice from the loading place above the Falls to New York, and the charterers were to employ the tug and pay for the towage services. The tug having waited to take another vessel in tow, together with the E., was too late in the tide, and in going under the bridge the topmast of the E. came into collision with the bridge and was damaged. *Held*, That the Court had jurisdiction to entertain the suit; that the delay of the tug in going through the Falls was evidence of negligence; and the tug and owners were condemned in damages and costs. *The Maggie M.*, 185.

See note to this case, *ante*, p. 189.

3. The owners of tug-boats plying in the harbor of St. John, N. B., entered into an agreement to charge a uniform rate for towage services, and specified the amounts for the different tows. The effect was to materially increase the rates on former years, when there was free competition and cut rates. The plaintiffs' tug, at the request of the H. E. K., rendered to the vessel towage services, and charged the combination rates. The vessel owner offered to pay what he had paid in former years for like services, and refused to pay more, claiming the combination rates were against public policy, and illegal. *Held*, That as the charges were reasonable and fair for the services performed, the plaintiffs were entitled to recover the full amount claimed. *The Hattie E. King*, 175.

See note to this case as to illegal combination in restraint of trade.

TREATY.

See **FISHERY ACTS.**

VICE-ADMIRALTY COURT.—The Court of Vice-Admiralty in the colonies has a concurrent jurisdiction with the Courts of Record there, in the case of forfeitures and penalties incurred by the breach of any Act of the Imperial Parliament relating to the

VICE-ADMIRALTY COURT.—*Continued.*

trade and revenues of the British possessions abroad. See *The Customs Consolidation Act, 1863* (17 & 18 Vict. c. 107, s. 183).

Vice-Admiralty Courts were made Courts of Record by 24 Vict. c. 10, s. 14 (1861).

2. So in the case of any penalties and forfeitures incurred by the breach of the Act of the Legislature of Canada consolidating the duties of customs, or by the breach of any other Act relating to the customs or to trade or navigation, concurrent jurisdiction is given to the Court of Vice-Admiralty with the Courts of Record.

3. So it has jurisdiction in the case of any penalties incurred by the breach of the proclamation of the 1st of January, 1801, prohibiting the use of colors worn in Her Majesty's ships. (8 & 9 Vict. c. 87.)

4. The jurisdiction of the Admiralty is now governed by the Admiralty Act, 1891. 402.

See ADMIRALTY JURISDICTION.

VIS MAJOR.

See INEVITABLE ACCIDENT.

WAGES.—The ship *M.* arrived in Liverpool, England, with a cargo consigned to parties there, with instructions to the master by the owners for their agents to collect inward freight and transact the ship's business. The agents purchased an outward cargo of coals for St. John, N. B., and informed the master it was on ship's account. By request of the agents, the master signed a draft for payment of cargo, although the owners, but unknown to the master, had sent the agents funds for the coals. The agents shortly after became insolvent. *Held*, in an action by the master for his wages, that the owners could not charge the draft against the master, and that he was entitled to recover his full wages with costs. *The Mistletoe*, 122.

WAGES.—*Continued.*

2. The plaintiff brought an action against the P. for wages and disbursements as master of the vessel. In answer to the master's request when abroad for a statement of his account and for payment, the managing owner sent the master his individual promissory note for \$800, payable with interest, on account of the wages. The managing owner subsequently became insolvent. The master, on his return to St. John, N. B., demanded payment from the owners of his wages and disbursements, the sum claimed including the amount of the promissory note. The owners, by their counter-claim, sought to set-off against the master's claim, among other things, the amount of the promissory note; but *Held*, That the master, under the circumstances of the case, had not lost his lien upon the vessel. The set-off was rejected, and the plaintiff held entitled to recover, with costs. *The Plover*, 129.

3. The master of a vessel registered in Canada, being also part owner, was discharged at the home port, where the other owners also resided. He caused the vessel to be arrested in a cause of subtraction of wages for an amount under \$200. *Held*, That the Court had no jurisdiction under 36 Vict. c. 129, s. 56 (Can.), and the cause was dismissed with costs. *The Jonathan Weir*, 79 (1883).

This is not now the law.

WORDS.

See INTERPRETATION OF TERMS.

WRECK.—For citation of Canadian and United States laws relating to reciprocal wrecking privileges, see note to *The Frier*, p. 184.

See SHIPWRECK.

ERRATA.

| PAGE | LINE | FOR | READ |
|------|----------------|---------------------------|---------------------------|
| 25 | 10 from top | c. 304 | c. 104 |
| 26 | 21 " | 6 App. Cas. | 5 App. Cas. |
| 43 | 13 from bottom | Kleinwort in | Kleinwort v. |
| 120 | 13 from top | Cargo <i>res</i> Schiller | Cargo <i>ex</i> Schiller |
| 128 | 11 from bottom | Defendant | Plaintiff |
| 176 | Note 1 | Lush. 130 | Lush. 108 |
| 190 | 12 from bottom | <i>The America</i> | <i>The American</i> |
| 385 | 6 from top | <i>The P. Culand</i> | <i>The P. Culand</i> |
| 584 | 3 " | Consolate | Consolato |
| 633 | 10 from bottom | <i>The Thomas</i> | <i>The Thomas Wilson.</i> |
| 685 | 7 from top | <i>Bella Mudge</i> | <i>Bella Mudge</i> |

On p. lxiv. of Introduction, 13 lines from bottom, for "barristers and other officers," read "surrogates, proctors, and other officers in the Court of Arches."



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